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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-2050

UNITED STATES,

Petitioner,

v.

LUIS ANTONIO ORTIZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	(v)
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. AN IMMIGRATION SEARCH FOR ALIENS, WHETHER CONDUCTED PURSUANT TO A ROVING, TEMPORARY, OR PERMANENT CHECK, MUST BE SUPPORTED BY PROBABLE CAUSE AS DEFINED IN *ALMEIDA-SANCHEZ V. UNITED STATES*, 413 U.S. 266 (1973)	10
A. There are no facts of constitutional significance which distinguish causeless automobile searches conducted as a result of roving, temporary, or fixed Border Patrol checks	12
B. Causeless stops and searches conducted by means of roving, temporary, or fixed checks cannot be supported by analogy to administrative inspections	16
1. Administrative inspection cases involving businesses closely regulated and licensed by the government are inapposite to Border Patrol searches for Illegal aliens	17
2. Petitioner's distorted application of Justice Powell's concurring opinion in *Almeida-Sanchez* does not sustain causeless, warrantless checkpoint searches	18

Page

3. Checkpoints such as at San Clemente have a mixed administrative-criminal investigation purpose characterized by armed agents conducting searches and making arrests which lead to the incarceration, prosecution and/or deportation of those apprehended 23

4. Inland fixed checkpoints are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States 31

5. Inland permanent checkpoints not at the functional equivalent of the border are ineffective in deterring illegal alien entry into the United States 35

6. Inland checkpoints in excess of 25 miles from the border cannot be justified because temporary visitors from Mexico with I-186 cards allegedly violate the terms of their documents 41

C. The traditional Fourth Amendment definition of probable cause applies to warrantless stops and searches at inland immigration checkpoints not located at the functional equivalent of the border 43

1. There is no authority for petitioner's assertion that warrantless, causeless stops and searches at checkpoints may be based upon a Border Patrolman's conclusion that the functional equivalent of probable cause exists to believe that vehicles containing immigration law violators will pass through a checkpoint 44

Page

2. Checkpoint stops and searches involve multiple intrusions upon the constitutionally-protected rights of an entire traveling public 45

3. The criminal-administrative nature of the San Clemente checkpoint, where the focus is to apprehend illegal aliens of a certain race, requires that an evidentiary basis exist for the stop and search of each vehicle to avoid abuse 50

II. ADVANCE JUDICIAL APPROVAL EVIDENCED BY A WARRANT UPON A SHOWING OF PROBABLE CAUSE FOR THE OPERATION OF AN IMMIGRATION CHECKPOINT IS THE ONLY CONSTITUTIONAL PROCEDURE AUTHORIZING STOPS AND SEARCHES OF VEHICLES BY THE UNITED STATES BORDER PATROL 56

A. The Fourth Amendment requirement that searches be authorized by a warrant issued upon a showing of probable cause applies to searches conducted at roving, temporary, and fixed immigration checkpoints 57

B. The absence of statutory or regulatory guidelines limiting the discretion of the Border Patrol in selecting target vehicles for search requires the protection of a warrant 60

C. Because millions of citizens come into contact with law enforcement officers at the San Clemente checkpoint each year, the need for a warrant procedure is more important in this context than with roving stops and searches 61

Page

III. PROBABLE CAUSE HAVING ALWAYS BEEN REQUIRED FOR SEARCHES OF AUTOMOBILES, A FORTIORI THE EXCLUSIONARY RULE MUST BE APPLIED TO CHECKPOINT AUTOMOBILE SEARCHES FOR ALIENS CONDUCTED AFTER *ALMEIDA-SANCHEZ* 70

A. The rule announced in *Almeida-Sanchez* was not a new application of the evidentiary exclusionary rule 70

1. Supreme Court precedent has continuously maintained a requirement of probable cause for a vehicle search 70

2. The requirement of probable cause as a prerequisite to automobile searches for aliens did not establish a new rule 71

3. Conflicting precedent of lower courts is always subordinated to the decisions of the Supreme Court 77

4. The checkpoints were neither created in reliance upon statutory precedent nor are they sustained by such legislation 78

5. The application of the three-point test of *Stovall v. Denno*, 388 U.S. 293, 297 (1967) favors the "retroactive" requirement of probable cause for alien vehicles searches 80

6. The Court of Appeals in *Bowen v. United States* held its decision was not retroactive 81

Page

B. The federal exclusionary rule should be applied to federal Border Patrol officers conducting alien checkpoint automobile searches prior to 9 May 1974 82

CONCLUSION 84

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Adams v. Williams, 407 U.S. 143 (1972) 14, 46

Alexander v. United States, 362 F.2d 379 (9th Cir. 1966) 33

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 1, 2, 3, 4, 6, 9, 10, 12, 14, 15, 16, 18, 19, 22, 30, 32, 43, 44, 46, 47, 54, 56, 57, 58, 66, 68, 70, 71, 72 73, 74, 75, 76, 78, 81, 82, 83

Au Yi Lau v. Immigration and Naturalization Service, 445 F.2d 217 (D.C. Cir. 1970) 79

Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967) 77

Beck v. Ohio, 379 U.S. 89 (1964) 19

Benton v. Maryland, 395 U.S. 784 (1969) 76

Bolling v. Sharpe, 354 U.S. 497 (1954) 54

Boyd v. United States, 116 U.S. 616 (1886) 49

Brinegar v. United States, 338 U.S. 160 (1949) 46, 47, 71

Cady v. Dombrowski, 413 U.S. 433 (1973) 71

Camara v. Municipal Court, 387 U.S. 523 (1967) ... 6, 22, 30, 31, 57, 59

Cardwell v. Lewis, 417 U.S. 583 (1974) 48, 83

Carroll v. United States, 267 U.S. 132 (1925) . 1, 6, 15, 31, 43, 47, 70, 72, 73, 74, 75, 76, 77, 78, 80, 82

Chambers v. Maroney, 399 U.S. 42 (1970) 71

Page

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 75

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 17, 18, 61

Contreras v. United States, 219 F.2d 63 (9th Cir. 1961) 77

Coolidge v. New Hampshire, 403 U.S. 443 (1971) .. 47, 49, 68, 69, 71

Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) 17

Davis v. Mississippi, 394 U.S. 721 (1969) 47, 50

Davis v. United States, 328 U.S. 582 (1946) 46

De Canas v. Bica, 40 Cal. App. 3d 976 (1974) 35

Dyas v. Superior Ct., 11 Cal.3d 628 (1974) 29

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 71

Edwards v. California, 314 U.S. 160 (1941) 17

Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963) 52, 77

Gaines v. Canada, 305 U.S. 337 (1938) 53

Gideon v. Wainwright, 372 U.S. 335 (1963) 67

Gosa v. Mayden, 413 U.S. 665 (1973) 75

Henry v. United States, 361 U.S. 98 (1958) 47

Hernandez v. Texas, 347 U.S. 475 (1954) 53

Herrera v. United States, 208 F.2d 215 (9th Cir. 1953) 35

Hurtado v. United States, 410 U.S. 578 (1973) 28

Husty v. United States, 282 U.S. 694 (1931) 71

Illinois v. Allen, 397 U.S. 337 (1970) 4

Johnson v. United States, 333 U.S. 10 (1948) 66

Katz v. United States, 389 U.S. 347 (1967) 48

Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962) 22

Loving v. Virginia, 388 U.S. 1 (1967) 54

Mancusi v. De Forte, 392 U.S. 364 (1968) 69

Massiah v. United States, 377 U.S. 201 (1964) 72, 76

Page

Michigan v. Tucker, 417 U.S. 433 (1974) 82

Milton v. Wainwright, 407 U.S. 371 (1972) 72, 75, 76

Miranda v. Arizona, 384 U.S. 436 (1966) 25, 29, 82, 83

O'Callahan v. Parker, 395 U.S. 258 (1969) 75

Powell v. Alabama, 287 U.S. 45 (1932) 72

Preston v. United States, 376 U.S. 664 (1964) 71

Robinson v. Neil, 409 U.S. 505 (1973) 75

Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969) 30

Scher v. United States, 305 U.S. 251 (1938) 71

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 83

Shapiro v. Thompson, 394 U.S. 618 (1969) 17

Stovall v. Denno, 388 U.S. 293 (1967) 80

Terry v. Ohio, 392 U.S. 1 (1968) 14, 46, 48, 54

United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971) 77

United States v. Baca, et al., 368 F.Supp. 398 (S.D. Cal. 1973) 2, 3, 4, 5, 11, 21, 24, 25, 28, 32, 35, 36, 37, 38, 39, 40, 53, 64, 65, 66

United States v. Biswell, 405 U.S. 311 (1972) 17, 18

United States v. Bowen, 500 F.2d 960 (9th Cir. en banc 1974) 9, 10, 33, 59, 63, 71, 72, 73, 74, 76, 81

United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973) 33

United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973) 32, 65

United States v. Camacho-Davalos, 468 F.2d 1382 (9th Cir. 1972) 50

United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974) 28

Page

United States v. Di Re, 332 U.S. 581 (1948) 71

United States v. Hortze, 179 F.Supp 913 (S.D. Cal. 1959) 30

United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974) 33

United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974) 74

United States v. King, 485 F.2d 353 (10th Cir. 1973) 10, 59, 73

United States v. Lewis, 460 F.2d 257 (9th Cir. 1972) 28

United States v. Lujan-Romero, 469 F.2d 683 (9th Cir. 1972) 29

United States v. Maddox, 485 F.2d 361 (10th Cir. 1973) 10, 59, 73

United States v. Mallides, 473 F.2d 859 (9th Cir. 1973) 50

United States v. Markham, 440 F.2d 1119 (9th Cir. 1971) 33

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United States v. Miller, 492 F.2d 37 (5th Cir. 1974) 73

United States v. Mora-Chavez, 496 F.2d 1181 (1974) 33

United States v. Moran, 456 F.2d 1066 (9th Cir. 1972) 28

United States v. Neustice, 452 F.2d 123 (9th Cir. 1971) 28

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United States v. Speed, 497 F.2d 546 (5th Cir. 1974) 10, 59, 66, 73

Page

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United States v. United States District Court, 407 U.S. 297 (1972) 57, 74

United States v. Verduzco-Macias, 463 F.2d 105 (9th Cir. 1972) 28

United States v. Weil, 432 F.2d 1320 (9th Cir. 1970) 33

United States v. Winer, 294 F.Supp. 731 (W.D. Tex. 1969) 30

Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970) 29, 30, 77

Waller v. Florida, 397 U.S. 387 (1970) 29

Watts v. Indiana, 338 U.S. 49 (1949) 76

Weeks v. United States, 232 U.S. 383 (1914) 48, 49, 70, 75, 80, 83

Williams v. Fears, 197 U.S. 270 (1900) 17

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 53

Constitution, statutes, regulations and rules:

United States Constitution, Fourth Amendment 6, 9, 15, 43, 44, 45, 46, 47, 48, 49, 50, 54, 55, 57, 59, 62, 67, 68, 74, 83

Immigration and Nationality Act, 66 Stat. 163, et seq., as amended, 8 U.S.C. 1101, et seq.

Section 101(a)(15)(B), 8 U.S.C. 1101(a)(15)(B) 42

Section 247(a)(4), 8 U.S.C. 1256(a)(4) 35

Section 274, 8 U.S.C. 1324 ..... 24, 25, 26, 34

Section 275, 8 U.S.C. 1325 26

Section 287(a), 8 U.S.C. 1357 ..... 12, 44, 60, 74, 79

18 U.S.C. 2 26

18 U.S.C. 1325 26

Page

8 C.F.R. 287.1 60

Federal Rules of Criminal Procedure,

Rule 41 19

Rule 43 4

Proposed Federal Rules of Evidence, Section 201 22

California Labor Code, Section 2805 35

Miscellaneous:

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.R. 349 (January 1974) 68

American Civil Liberties Union, Police Power and Citizens' Rights (1967) 54

Comment, 7 *Vand. Jour. of Transnational Law*, 762 (1974) 55

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Page

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S.E. Morison, *The Two Ocean War* (Little Brown 1963) 38

National Advisory Commission on Civil Disorders, Report (1968) 54

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Note, *Automobile License Checks and the Fourth Amendment*, 60 Va.L.Rev. 666 (1974) 55

Note, *Automobile Spot Checks and the Fourth Amendment*, 6 Rutgers-Camden L.J. 85 (Summer 1974) 49, 55

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Tribe, *The Supreme Court: 1972 Term*, 87 Harv.L.Rev. 1 (Spring 1974) 55

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether this Court's decisions in *Carroll v. United States*, 267 U.S. 132 (1925) and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)–which held that traditional notions of probable cause applied to warrantless, causeless searches of automobiles–apply to warrantless, causeless Border Patrol searches of automobiles at the fixed checkpoint at San Clemente, California.

II. Whether the requirement for either probable cause or a warrant to stop and search a vehicle for aliens at a checkpoint existed *after* the decision in *Almeida-Sanchez* (21 June 1973).

STATEMENT OF THE CASE

With the petitioner's statement of facts as it relates to the trial based upon stipulated facts in this case, respondent has no quarrel. (Brief for Pet. 4) However, with respect to petitioner's assertion that the opinion in *United States v. Baca, et al.*, 368 F.Supp. 398 (S.D. Cal. 1973) [hereinafter cited as *Baca*] is part of the record in this case, respondent disagrees. As reflected in respondent's response to the petitioner's motion to dispense with the requirement of an appendix, trial counsel for the respondent reiterated his motion to suppress evidence based on *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The trial court, Judge Schwartz, responded:

> "Well, the motion, I think has been ruled on. Judge Turrentine is filing an opinion this morning. Now, I don't know as of yet how this would be affected, because I haven't had an opportunity to read the opinion. A copy of it has been just supplied to me, and I suppose I can take a look at it and see if there is anything—although it's rather lengthy, that might affect this, but I don't think so. *I think I'm simply going to make the ruling on my own in this particular case with regard to Almeida-Sanchez question and the validity of the San Clemente checkpoint.*" (Tr. 4-5)[1] [Emphasis added]

Thus, while the trial court had the opportunity to incorporate Judge Turrentine's opinion as its own, it chose not to do so. Clearly, the trial court had the opportunity to read Judge Turrentine's opinion and either accept its holdings and incorporate it as part of respondent's case, or reject it. The petitioner suggests that because the trial court chose to do neither by ignoring Judge Turrentine's opinion and making its own decision "in this particular case," that the consolidated hearings automatically became part of respondent's record. Respondent submits that the purpose behind the consolidated hearings was to give one trial court the opportunity to review the constitutionality of the checkpoints in the Southern District of California after an evidentiary hearing. By referring cases to Judge Turrentine, the other four judges in the Southern District of California did not stipulate that they would be bound by whatever result Judge Turrentine reached. Indeed, that is why "Judge Turrentine did not, . . . specifically rule on the individual validity of any of the searches that occured in the sixteen cases that were consolidated for the evidentiary hearing. That determination was left to the judge principally assigned to each case." (Brief for Pet. 7-8) Thus, when the case was referred back to Chief Judge Schwartz, the latter elected not to refer to Judge Turrentine's opinion. Rather, the trial court decided to rule on respondent's

[1] Tr. shall refer to the transcript of matters before Judge Schwartz. B.Tr. shall refer to the hearing in *United States v. Baca, et al.*

motion to suppress "on my own in this particular case with regard to *Almeida-Sanchez* question and the validity of the San Clemente checkpoint." (Tr. 4-5) This conclusion is buttressed by the fact that respondent did not attend the *Baca* hearings and did not waive his right to be personally present. Although represented by counsel during the consolidated motion hearings (B.Tr. 9), the respondent himself was not present, nor was there a waiver of his presence filed for those hearings. A defendant charged with a felony has a constitutional right to be personally present in the courtroom at every stage of his trial, unless he shall forfeit that right by conduct that is so disorderly and disruptive that his trial cannot be carried on with him in the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970). Certainly if the *Baca* opinion is to be deemed part of respondent's trial record, the district court's hearing of the motion to suppress in respondent's absence was without legal justification. Fundamental constitutional rights, such as the right to be present at a motion to suppress hearing, do not yield to calendar convenience. *See* Rule 43, *Federal Rules of Criminal Procedure*.

Technically, the case did include the actual record of the *Baca* hearings because the General Order (Brief for Pet. 59-60) did refer the *Ortiz* case for a consolidated evidentiary hearing. The government is in a better position to assert that the transcript of the hearing and exhibits introduced are before this Court, but the conclusion (opinion) of Judge Turrentine is not. Although the respondent will of necessity make reference to the testimony and exhibits of the *Baca* hearing, the respondent does not waive the procedural

and substantive errors and limitations of that hearing. In light of the foregoing, petitioner's attempt to bootstrap the *Baca* opinion onto this case is inappropriate and should not receive the sanction of this Court. For purposes of resolution of this question, respondent did not oppose the inclusion of the transcripts and exhibits of the *Baca* hearing which are the best evidence of the shortcomings of the district court opinion.

SUMMARY OF ARGUMENT

Each year some ten million American motorists traverse north on Interstate Highway 5 toward Los Angeles, California. Their journey is interrupted by a permanent Border Patrol checkpoint located near San Clemente, California, some 66 miles north of the Mexican-American border. As each motorist reaches the checkpoint, at least one Border Patrol officer is standing in the middle of the highway halting all traffic. The officer visually inspects the occupants of the vehicle and makes a subjective determination, guided by no statutory or administrative regulation, to refer vehicles off the road for further interrogation. Once referred off the highway, the occupants of the vehicle are subjected to interrogation concerning their citizenship and right to be in the United States by armed, uniformed officers. If the officers so elect, the driver may be ordered to open the trunk and hood of his vehicle. At no time prior to any of this activity do the officers have a reasonable suspicion directed at the occupants of the vehicle that they may be violating immigration laws. Because the Border Patrol is looking

for illegal Mexican alien entrants, the occupants of the vehicle are usually referred off the highway because of apparent Latin-American appearances. In Southern California, there are hundreds of thousands of citizens and lawful residents of Latin-American appearance.

When this Court declared roving warrantless, causeless stops and searches conducted by the Border Patrol unconstitutional in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), the authority for the above-described warrantless, causeless stop and search activity at Border Patrol checkpoints vanished. The three circuit courts of appeal which have ruled on warrantless, causeless searches conducted at checkpoints not the functional equivalent of the border agree that *Almeida-Sanchez* invalidates such searches. The Fifth, Ninth, and Tenth Circuits have held that a necessary antecedent to a lawful automobile stop and search at an immigration checkpoint is probable cause. The principle of probable cause to search is not the invention of intervening courts or a new concept; it is a constitutional mandate of the Fourth Amendment and applied to vehicles by this Court for at least fifty years. *Carroll v. United States*, 267 U.S. 132 (1925).

I.

In seeking a constitutional theory to support the warrantless, causeless stops and searches at the San Clemente checkpoint, the petitioner retreats to the authority of administrative inspection cases such as *Camara v. Municipal Court*, 387 U.S. 523 (1967). Administrative inspection cases are inapposite here since

the operation of the San Clemente checkpoint involves criminal investigations in which armed law enforcement officers conduct stops and searches and arrest all persons found violating the immigration statutes. Whether or not prosecution is subsequently authorized is a matter largely dependent upon the press of caseloads, the availability of jail space, and prosecutorial discretion.

The operation of inland permanent checkpoints is but one of numerous Border Patrol operations to deter aliens from illegally entering the United States. The inland checkpoints have taken away from the border personnel needed to protect against illegal entry at the first opportunity; in fact, there are almost twice as many officers assigned to the San Clemente checkpoint as are assigned to the entire Mexico-California border. Nevertheless, the checkpoints account for only 8% of the total deportable aliens apprehended in the United States and are ineffective in either deterring or apprehending aliens. The San Clemente checkpoint, for instance, apprehends only about 5% of the illegal alien traffic going through it. In one twenty-day working period, Immigration and Naturalization Service (INS) officers apprehended more deportable aliens in Los Angeles than were apprehended in an entire year at the San Clemente checkpoint. *Hearings, infra* note 24 at 30.

In addition to the numerous alternative programs the INS has to deter and apprehend deportable aliens, it is with Congress that the most meaningful deterrent may be found. Legislation to make the knowing employment of a deportable alien illegal is the only effective way of deterring the entry of poor aliens who come to the United States in search of work.

II.

The petitioner asserts the San Clemente checkpoint operation is constitutional because there exists a "functional equivalent of probable cause" to believe immigration violations are taking place in that area. If this concept of probable cause is to be truly "functional" and "equivalent," then a significant number of the cars traversing through the checkpoint should contain immigration law violaters. However, statistical samples indicate that less than one tenth of one per cent of the people in automobiles passing through the checkpoint are deportable aliens. The petitioner asserts that the determination of the functional equivalent of probable cause and thus the location of a checkpoint is one that Border Patrol officers may make while safeguarding the Fourth Amendment rights of the public. Respondent submits that if the functional equivalency doctrine has validity, the determination of probable cause based on equivalency criteria is one only a judicial officer may make. Given the focus on aliens illegally entering from Mexico, it is no secret that Border Patrol officers are stopping cars, interrogating occupants, and searching vehicles driven by persons of Latin-American appearance in order to locate the deportable Mexican aliens. These decisions are currently being made at the whim of the officers manning the checkpoints. Respondent submits that unless there is probable cause to believe immigration violators are within a vehicle under traditional standards, that the protection of a warrant is necessary prior to the operation of a checkpoint. Such warrants are currently being issued in the judicial districts in the southwestern United States.

III.

The contention of the petitioner that *Almeida-Sanchez* should not be applied to stops and searches conducted at checkpoints prior to 9 May 1974, the date of the opinion in *United States v. Bowen*, 500 F.2d 985 (9th Cir. *en banc* 1974) is untenable. As the *Bowen* court stated, when this Court held that the statute and regulation concerning Border Patrol stop and search powers were not exempt from traditional Fourth Amendment scrutiny, "the government's statutory justification for fixed checkpoint searches as well as for roving patrol searches vanished." (*Id.* at 988) *Bowen* overturned no Ninth Circuit precedent; *Almeida-Sanchez* did. *Almeida-Sanchez* clearly foreshadowed the Ninth Circuit decision in *Bowen*.

In *Bowen* the Ninth Circuit took the position that its prior decisions required that *Almeida-Sanchez* be given a limited prospective application, i.e., only to those searches which occurred after 21 June 1973, the date of the *Almeida-Sanchez* opinion. Although respondent disagrees with this view of the Ninth Circuit in refusing to hold the probable cause requirement applicable to all checkpoint searches, this is not an issue here where the search occurred after the decision in *Almeida-Sanchez*. The application given *Almeida-Sanchez* in this case is correct and the decision of the Ninth Circuit must be affirmed.

ARGUMENT

I.

AN IMMIGRATION SEARCH FOR ALIENS, WHETHER CONDUCTED PURSUANT TO A ROVING, TEMPORARY, OR PERMANENT CHECK, MUST BE SUPPORTED BY PROBABLE CAUSE AS DEFINED IN *ALMEIDA-SANCHEZ V. UNITED STATES*, 413 U.S. 266 (1973).

The judgment of the three courts of appeal whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, perhaps have the best vantage point to judge the practicalities of border area law enforcement and the reasonableness of official searches of vehicles to enforce immigration statutes, is that warrantless searches conducted without probable cause at permanent checkpoints are invalid under *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). *United States v. Bowen*, 500 F.2d 960 (9th Cir. *en banc* 1974); *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974); *United States v. King*, 485 F.2d 353 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973).[2]

[2]The Tenth Circuit cases of *Maddox* and *King* were remanded to the trial courts with instructions to grant the motions to suppress unless the checkpoints were found to be at the functional equivalents of the border. See *Almeida-Sanchez, supra* at 275. Since the government concedes that the checkpoint involved in this case is not at the functional equivalent of the border, no further discussion of this concept is necessary. *See* Brief for Pet. 16.

The San Clemente checkpoint is a permanent roadblock of all traffic proceeding north between California's two largest cities, San Diego and Los Angeles, and is situated 66 miles north of the Mexican-American border. The operation of the checkpoint is totally unregulated in that Border Patrol officers at the checkpoint have complete and unfettered discretion to stop and refer any vehicle off the highway for interrogation and search purposes. The checkpoint is manned by a uniformed, fully-armed, Border Patrol law enforcement officer standing in the middle of the highway. As the decelerating oncoming vehicles approach this officer's position, the latter visually determines whether or not he desires to refer the car to the secondary position off the highway for interrogation and search.[3]

[3]It is quite clear that all traffic is initially stopped on the highway at the San Clemente checkpoint for the initial visual examination by the point officer and, if traffic is light, questioning. If the officer believes the car should be further examined based upon his own subjective evaluation, he may refer it off the highway for a search. In *United States v. Baca*, 368 F.Supp. 398, 415 (S.D. Cal. 1973), the District Court judge found that at the San Clemente checkpoint the average motorist is stopped although it may be "nothing more than a fleeting stop;...." (*Id.* at 415) The brief of the petitioner does not recognize the initial stop that takes place in the middle of the highway to allow the point officer this opportunity to visually examine the occupants and interior of the approaching vehicles. To avoid semantic disagreements, respondent will refer in this brief to this initial stop as being the point stop and the direction off the highway for further interrogation and search as the secondary stop. This characterization comports with Border Patrol practice and terminology.

In *Almeida-Sanchez*, the only asserted justification for the Border Patrol's alleged right to stop and search every car within 100 miles of the border area was § 287(a) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a) and its accompanying regulations, 8 CFR § 287.1. This Court held that such an extravagant license to search was not granted by the statute and regulation. The license sought to justify the procedure at the San Clemente checkpoint is even more extravagant than that requested and rejected in *Almeida-Sanchez*. While roving patrols involved a single officer stopping a single vehicle in isolated, rural areas near the border, the government seeks an open-ended license to stop and search all traffic between two of the largest cities in the United States at a point 66 miles north of the international border. For the reasons expressed below, this application to deconstitutionalize vast swaths of land area well within the borders of the United States must be firmly rejected.

A. There are no facts of constitutional significance which distinguish causeless automobile searches conducted as a result of roving, temporary, or fixed Border Patrol checks.

The only difference between the stop and search in this case and that which was the subject of review in *Almeida-Sanchez* is that respondent's stop occurred at a fixed checkpoint rather than by a roving immigration stop. Unlike Conrado Almeida-Sanchez who was "redlighted" to the side of the road by a Border Patrolman in a marked vehicle 25 miles from the border, the respondent was initially stopped by a

uniformed, armed Border Patrolman standing in the middle of Interstate 5 some 66 miles north of the Mexican-American border. The officer ordered respondent to drive off the freeway to a secondary position for further interrogation and a search of his vehicle. Thus, the difference between the stops and searches in both cases is that respondent's occurred at a permanently-located roadblock while Conrado Almeida-Sanchez was stopped by a roving vehicle. The difference of the intrusion to the victim is insignificant; this Court has never held a stop and search at a roadblock to be less intrusive than a stop and search resulting from a roving patrol vehicle.

Although the intrusion to the victim is the same at roving, temporary, and permanent checkpoints, the latter two operations do differ from the roving procedure in that more of the traveling public are forced to place their liberties in the hands of the officers at checkpoints. Roving checkpoint operations located in remote areas close to the border involved less Border Patrol-citizen contacts; the San Clemente checkpoint operation alone involves a massive, permanent roadblock of thousands of vehicles each day well away from the border. The yearly traffic flowing north and stopped at this roadblock is in excess of ten million vehicles per year.[4]

[4] Brief for Pet. 41, n. 21 makes a reference to *United States v. Martinez-Fuerte*, No. 74-2462, currently before the Ninth Circuit. *Martinez-Fuerte* involves a warrant issued to authorize operation of the San Clemente checkpoint. The affidavit submitted by Assistant Chief Patrol Agent for the Chula Vista Sector, Robert D. McCord, to obtain the warrant indicates the average hourly traffic passing through the checkpoint to be 1200 vehicles. Multiplying this hourly rate times the hours in one year reveals that 10,512,000 cars pass the checkpoint annually. The warrant in *Martinez-Fuerte* is included as Appendix A to this Brief.

For constitutional purposes, this examination of the similarities in respondent's stop and search and that of Conrado Almeida-Sanchez is decisive. In both cases, the Border Patrol agents had no search warrant, no probable cause before the stop or subsequent search, nor was there even the "reasonable suspicion" found sufficient for a street detention and weapon search in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Adams v. Williams*, 407 U.S. 143 (1972). The officers did not have reason to believe that respondent had crossed the border or had been in contact with anyone that had. Just as with the case involving Almeida-Sanchez, the stop and search "in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent." *Almeida-Sanchez, supra* at 271. This permanent roadblock offers the Border Patrol just the "field day" in searching automobiles which the Border Patrol was declared not to have in *Almeida-Sanchez, supra*, at 269. As in *Almeida-Sanchez*, the government can point to no regulations of any judicial or administrative authority which circumscribe the discretion of the Border Patrolmen at the checkpoint in determining whom they shall subject to the more intrusive interrogation and search after the initial primary stop. Moreover, because over a thousand cars per hour are stopped at primary for the initial inspection, the permanent roadblock at San Clemente offers more opportunities for the exercise of the Border Patrolman's unfettered discretion than occur in roving stops by individual officers in rural areas near the border.

Petitioner argues that the safety features at permanent checkpoints involving lighting and warning signs somehow make the subsequent intrusion on the traveling public less traumatic, thus magically metamorphosizing unconstitutional activity into legal action. Respondent submits that safety and civility are norms expected of governmental officers in conducting stops, interrogations, and searches of vehicles. No court has ever held that warrantless, causeless stops and searches by law enforcement officers attain legal status solely because they are conducted in a safe and humane manner. Courtesy does not eradicate a violation of the Fourth Amendment.

The probable cause requirement for a stop and search of an automobile is not a new principle. The language quoted in *Almeida-Sanchez* from Chief Justice Taft's opinion in *Carroll v. United States*, 267 U.S. 132 (1925) is directly on point here. Speaking in an era when the automobile had not yet become the commonly recognized transportation conveyance, the Court recognized the indignity and inconvenience of a stop and search. Today the automobile is available to all and necessary to most persons; thus, Chief Justice Taft's language has even greater force:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which

may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (*Id.* at 154)

B. Causeless stops and searches conducted by means of roving, temporary or fixed checks cannot be supported by analogy to administrative inspections.

The government returns to the administrative inspection rationale rejected by this Court in *Almeida-Sanchez* in order to justify its causeless stop and search operations at checkpoints. Again:

> "In seeking a rationale for the validity of the search in this case, the government . . . relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search." *Almeida-Sanchez, supra* at 270.

As in *Almeida-Sanchez*, the government points to no previous decision of this Court involving the causeless search of an automobile for authorization of causeless stops and searches at the San Clemente roadblock. Despite the clear language by this Court ("Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez, supra* at 269), the government returns to the administrative inspection cases for support.

1. Administrative inspection cases, involving businesses closely regulated and licensed by the government, are inapposite to Border Patrol searches for illegal aliens.

Administrative inspections of commercial enterprises authorized by statutes have met with the approval of this Court when the businesses have long histories of close regulation and licensing by the government. *United States v. Biswell*, 406 U.S. 311 (1972) [firearms]; *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) [liquor].

The rationale of the Court in upholding statutorily authorized administrative inspections is that one engaged in federally licensed and regulated enterprises accepts the burdens as well as the benefits of the trade. In this case, the respondent was engaged in no heavily-regulated or licensed enterprise. He was merely exercising his constitutional right to travel free from baseless governmental intrusion while within the United States. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

An important distinguishing characteristic of the administrative inspections of regulated businesses is that such inspections are made pursuant to detailed legislative guidelines, statutes, or ordinances, which carefully circumscribe the discretion of the inspecting official. The authorizing statute, much like a search warrant, contains standards limiting the time, place, and scope of the inspections. Here, there is no authorizing statute or administrative regulation which in any way limits the time, place, scope or subjects of alien searches. That decision is left to the unbridled

discretion of the point officer standing in the middle of the highway. Further, the scheme of the regulation in the administrative context is sufficiently pervasive that those subject to inspection have been put on notice by their own familiarity with the statutes and the frequent visits of the inspectors. In addition, inspecting officials know with certainty that the premises to be inspected are in fact within the scope of their authority. However, the traveling public does not have notice of the requirement of searches at checkpoints (B. Tr. 281), nor do the officers know if the victims of their search are violating immigration laws.

The above comparisons explain why this Court rejected the government analogy to administrative inspection decisions to support the constitutionality of roving stops and searches conducted by the Border Patrol. *Almeida-Sanchez, supra* at 272. "*Colonnade* and *Biswell* cannot fairly be read to cover cases of the present type." *Almeida-Sanchez, supra* at 281. (Powell concurring). The government's continued reliance on these cases is misplaced. (Brief for Pet. 19, 26)

2. Petitioner's distorted application of Justice Powell's concurring opinion in *Almeida-Sanchez* does not sustain causeless, warrantless checkpoint searches.

In seeking a constitutional justification to support its immigration roadblock at San Clemente, petitioner also relies heavily upon the concurring opinion of Justice Powell in *Almeida-Sanchez, supra* at 275-285. Justice Powell stated that given the Border Patrol's difficult mandate in enforcing the immigration laws in the border area, under certain prescribed circumstances the

"functional equivalent of probable cause"[5] may exist for the type of immigration searches conducted by the roving Border Patrol check. (*Id.* at 277). Recognizing that the standards for a functional equivalent of probable cause in the context of immigration searches are relatively unstructured, Justice Powell suggested four relevant factors[6] which would merit consideration in the probable cause equivalency formula. (*Id.* at 283-284). It is significant to note that petitioner does not even attempt to satisfy those criteria.

Petitioner points to the number of aliens apprehended at the San Clemente roadblock (Brief for Pet. 26) but fails to demonstrate how these statistics differ from every road leading north from the border in the southwestern United States. One of the factors in Justice Powell's probable cause equivalency formula is the proximity of the area in question to the border. *Almeida-Sanchez, supra* at 284. The San Clemente immigration roadblock is located 66 miles north of the international border. Since the activity of the Border Patrol along the border draws "a large measure of

[5] The functional equivalent of probable cause is a new concept and without the clearly articulated standard that could be announced by statute or court rule (i.e. amendment to Rule 41, *Federal Rules of Criminal Procedure*). The respondent suggests adherence to the traditional test for probable cause. *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

[6] The four factors are: a) frequency of deportable aliens in a particular area; b) proximity of area to the border; c) geographic characteristics of the area; and d) degree of interference with the rights of innocent persons taking into account the scope and duration of the search and the concentration of illegal alien traffic in relation to general traffic in the area. 413 U.S. 283-284.

justification from the Government's extraordinary responsibilities and powers with respect to the border," (*Id.* at 270) it follows that the further away from the border, the less compelling petitioner's argument for a roadblock of all vehicular transportation on the busiest highway in California south of Los Angeles.

Another of Justice Powell's considerations in the probable cause equivalency formula is "the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, . . . " (*Id.* at 284). The consideration supporting this factor is that along much of the Mexican-American border "there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities–by virtue of their isolated character–for the smuggling of aliens." (*Id.* at 284, n.4) The roadblock at San Clemente, some 66 miles north of the border, hardly fits within this subcategory. The roadblock is on a busily-traveled interstate highway with vehicles traversing the checkpoint at an annual rate in excess of ten million. Further, the roadblock is located between the two most populous cities in California and directly north of ten other Southern California communities. The premise underlying this factor of geographic character is that in isolated areas between ports of entry *along the border* there are great opportunities for unauthorized entries and smuggling ventures to take place. The San Clemente checkpoint is on Interstate 5 which emanates from the San Ysidro port of entry. Thus, the trickle of traffic emanating from the border has been subjected to border inspection and faces a further intrusion at the San Clemente checkpoint. More important, most of the

traffic at San Clemente does not emanate from the border at all.[7]

The final and most important consideration in the formula is "the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." (*Id.* at 284) The San Clemente roadblock involves a two-stop procedure. All traffic is stopped initially for a visual examination of the occupants and interior of the vehicle by the point officer. During this inspection, the point officer makes a decision to refer the vehicle off the highway for a more extensive and intrusive examination or to allow it to proceed. While the degree of intrusion of the millions of vehicles that are stopped yearly at primary is less substantial than that which occurs at secondary,

[7]Defense Exhibit C at the *Baca* hearing indicates that the traffic flow of major highways, including Interstate 5, is insubstantial in the areas close to the border, but demonstrably increases north of San Diego.

it must be noted that 99.9% of all vehicles stopped at this checkpoint contain no immigration law violators.[8]

Neither the Petitioner's Brief nor the record satisfies the four factors in the probable cause equivalency test cited in Justice Powell's concurring opinion. In addition to lacking a factual record to support a functional equivalent of probable cause theory, petitioner also seeks to eliminate the warrant requirement from Justice Powell's requirements. Although this brief considers the warrant argument below, respondent submits that such omissions improperly separate the equivalency formula from the warrant requirement to distort and misplace application of Justice Powell's opinion.[9] Justice Powell

[8]The return on the warrant of inspection in *United States v. Martinez-Fuerte, supra* note 4, revealed that 145,960 vehicles passed through the San Clemente checkpoint during a 124 hour period of operation. Of these vehicles, only 171 were found to contain deportable aliens, or 0.12% of all vehicles passing through the checkpoint. Thus, the initial intrusion involving the point stop violated the right to free movement of all the motorists who were traveling through the checkpoint, 98.88% of whom had no illegal alien passengers. Since many vehicles contain more than one passenger, the ratio between the concentration of illegal aliens in relation to the individuals violating no immigration law in the area is substantially increased, i.e., less than .01%. This Court may take judicial notice of adjudicative facts now before the Ninth Circuit Court of Appeals. *See Proposed Federal Rules of Evidence* § 201; *Lambert v. Conrad*, 308 F.2d 571 (9th Cir. 1962).

[9]The petitioner's singular appeal to Justice Powell is inappropriate (Brief for Pet. 17, n.7), for the action of the Court should depend upon the interaction of collective reasoning following the traditional concepts of *stare decisis*. The disclaimer that the petitioner is not seeking to overrule *Almeida-Sanchez* appears inconsistent with the reasoning put forth. The petitioner always has the right to urge an overruling, but should say so.

suggested that reasonable roving Border Patrol searches could be made within the interior of the United States when supported by the functional equivalent of probable cause determined by a judicial officer and authorized by a search warrant. This relaxation of the probable cause requirement may not be separated from the requirement of prior judicial review. The concept of the equivalency of probable cause was articulated in connection with a warrant requirement. The petitioner's conversion of this concept to permit the officer on the scene to make a judgment where and when the equivalent of probable cause exists is incompatible with Fourth Amendment doctrine requiring the intervention of the judiciary.

3. Checkpoints such as at San Clemente have a mixed administrative-criminal investigation purpose characterized by armed agents conducting searches and making arrests which lead to the incarceration, prosecution and/or deportation of those apprehended.

The probable cause equivalency concept pronounced in *Camara v. Municipal Court*, 387 U.S. 523 (1967), was applied only to a purely administrative health inspection. It is inapplicable to the criminal law enforcement program conducted at the San Clemente roadblock. *Camara* held that administrative home inspections to enforce community health and welfare regulations could be made with warrants without the necessity of an evidentiary basis directed at particular dwellings. Petitioner's reliance on *Camara* is misplaced because even in the administrative atmosphere of housing code inspections, a warrant is required. Further, the

administrative characterization of code enforcement has no equivalent in the setting of checkpoint searches for aliens. Congress may elect to make it so, but it has not acted.

The primary purpose of the San Clemente checkpoint, according to the petitioner, is administrative rather than criminal law enforcement. (Brief for Pet. 27) Respondent submits that the purpose of the checkpoint is twofold: a) to locate illegal aliens and deport them, and b) to detect, arrest, and prosecute repeat-violator illegal aliens and alien smugglers. As stated by the district court in *Baca*:

> "The primary objective of the checkpoint is to intercept vehicles or conveyances transporting illegal aliens, or non-resident aliens admitted with temporary border passing cards (I-186), *with particular attention being paid to vehicles operated by smugglers or transporters destined for inland cities in violation of 8 U.S.C. §1324." United States v. Baca,* 368 F. Supp. 398, at 406 (S.D. Calif. 1973). [Emphasis supplied]

According to the *United States Border Patrol Handbook:* "The primary purpose of this [traffic inspection] operation is to locate deportable aliens and smugglers of aliens attempting to travel to the interior of the United States after evading detection at the border. Secondarily, assistance is rendered to the Bureau of Customs in the enforcement of statutes which relate to the smuggling of contraband." [Government Exhibit 43, 9-1, B.Tr. 483-484]

As a result of all Service operations in fiscal 1973, "officers presented about 40,000 cases to United States Attorneys for possible prosecution and . . . prosecution was authorized in 40% of the cases." *Hearings, infra* note 24 at 288.

Every car search at a checkpoint which is found to contain illegal aliens involves a possible violation of 8 U.S.C. §1324(a)(2) by the driver, a felony statute punishable by five years in prison for each alien transported. The hearings in *Baca* demonstrated the criminal investigative nature of the operation of the San Clemente checkpoint. Deputy Chief Border Patrol Agent of the Chula Vista Sector, Richard E. Batchelor, testified that Border Patrol officers are trained in the use of firearms such as .357 magnum revolvers and shotguns. (B.Tr. 255) Batchelor testified that Border Patrol officers are law enforcement officers and not mere administrative clerks. (B.Tr. 256) Border Patrolmen at the checkpoint are in full dress uniform armed with a revolver at the waist. (B.Tr. 289) According to Chief Patrol Agent of the El Centro Sector of the Border Patrol, Henry C. Felchlin, when an arrest is made at a checkpoint of an illegal alien, the alien is immediately advised of his rights per *Miranda v. Arizona,* 384 U.S. 436 (1966). (B. Tr. 395) A personal search of the arrested individual is made. (*Id.*) The Acting Commissioner of Immigration and Naturalization Service, James F. Greene, testified that the primary function of the United States Border Patrol is preventing illegal entry, apprehending those who have illegally entered and arresting alien smugglers. (B. Tr. 16)

A reading of the testimony of United States Magistrate Harry McCue at the *Baca* hearing is fundamental to an understanding of the criminal investigative nature of the checkpoint. Magistrate McCue explained the prosecution procedure of the United States in the Southern District of California involving defendants who are apprehended in the

context of alien smuggling. A typical complaint is worded in two counts, one charging a violation of felony transportation of illegal aliens under 8 U.S.C. §1324(a)(2) while the second count is a misdemeanor charging a violation of aiding and abetting the illegal entry of aliens under 18 U.S.C. §2 and 8 U.S.C. §1325. (B. Tr. 457) The purpose of this type of complaint is to give the accused an opportunity to plead to a misdemeanor as soon as possible. Since all of the aliens located in a vehicle driven by an accused smuggler must be incarcerated to provide the defendant an opportunity to examine them for possible exculpatory evidence, this unique complaint procedure allows an accused to plead guilty to a misdemeanor and for the prompt release of the alien witnesses to Mexico. *See United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971) (B Tr. 457). Magistrate McCue testified that all such cases could be prosecuted on a felony basis alone if the government so elected.

> "I don't think there is any question about that. That all the defendants who are charged criminally, under the immigration laws, could have been charged with felony violations of the immigration laws, . . ." (B. Tr. 458)

He also testified that the reason rather substantial jail terms are handed out to defendants in magistrate court is that the latter court is faced with processing felony alien smuggling cases on a misdemeanor level. (B. Tr. 458)

When aliens are found in a vehicle at a checkpoint, the individuals in the vehicle are treated by the government as either criminal defendants or material witnesses. (B. Tr. 464) The election whether to charge

the individual as an illegal entrant, a smuggler, or a material witness detained for possible court testimony is that of the government. (B. Tr. 464)

Magistrate McCue testified that two of the three full-time magistrates in the Southern District of California (excluding from consideration two part-time magistrates) handled in 1971 and 1972 about 7,000 immigration cases each year. (B. Tr. 464) Virtually none of these prosecutions involved illegal entrant passengers of vehicles who were merely being transported or attempting to enter on foot. (B. Tr. 464-465) Of the 7,000 prosecuted per year, approximately 40% were permanent resident aliens or citizens of the United States. (B. Tr. 467) Of this group of individuals having a legal right to be here, the vast majority of their prosecutions involve smuggling violations. Because the government usually does not choose to prosecute the simple illegal alien entrant, only those with an aggravated history of repeated entry or those who elect to drive other illegal aliens are prosecuted.

In sum, the prosecution pattern in the Southern District of California reveals thousands of prosecutions for smuggling violations. This prosecution scheme involves not only the arrest of the driver of a vehicle, but also the detention of all the illegal aliens, who are retained and incarcerated in the United States to insure the defendant and the government a fair trial. (B. Tr. 470) The illegal alien entrant apprehended at a checkpoint is not simply administratively processed and deported to Mexico. With the arrest of a smuggler for prosecution, all of the aliens must be held in custody as

material witnesses. (B. Tr. 470)[10] To these material witnesses who are not officially charged with any crime, the fact that they are jailed, wear prison clothing, shackled with handcuffs and chains when they come to court, and imprisoned alongside convicted felons and others accused of serious felonies, it makes little difference whether the label for processing be termed criminal or administrative. The result is the same—they are treated like criminal defendants. *See Hurtado v. United States,* 410 U.S. 578 (1973); Henry, *The Wetback as a Material Witness: Pre-Trial Detention or Disposition,* 1 *Cal. West L. Rev.* 175 (1970).

The *Baca* hearing also demonstrated that Border Patrol officers of the Service are bona fide law enforcement officers and not merely administrative functionaries. (B. Tr. 255-256) The Service often invites representatives from the Drug Enforcement Agency and Customs, if they wish, to join them at the check-

[10]The Ninth Circuit has decided numerous cases within a criminal law context involving illegal alien material witnesses: *United States v. Carrillo-Frausto,* 500 F.2d 234 (9th Cir. 1974); *United States v. Tsutagawa,* 500 F.2d 420 (9th Cir. 1974); *United States v. Lewis,* 460 F.2d 257 (9th Cir. 1972); *United States v. Verduzco-Macias,* 463 F.2d 105 (9th Cir. 1972); *United States v. Moran,* 456 F.2d 1066 (9th Cir. 1972); *United States v. Peyton,* 454 F.2d 213 (9th Cir. 1971); *United States v. Neustice,* 452 F.2d 123 (9th Cir. 1971); *United States v. Mendez-Rodriguez,* 450 F.2d 1 (9th Cir. 1971).

In 1973, 291,544 deportable aliens were incarcerated in INS (171,559) and other jail-type institutions (120,985). Mexican aliens accounted for 94.6% of this total. 1973 *Annual Report,* 15.

points.[11] Immigration officers have been designated as acting Customs agents by a series of delegations of authority held proper in *United States v. Thompson,* 475 F.2d 1359 (5th Cir. 1973). While Border Patrol officers are investigating for alien smuggling violations, their intrusive searches often reveal other violations such as the possession of various forms of controlled substances. "Border Patrol officers . . . encountered and released to appropriate agencies 3,342 violators of other laws, including 1,984 violators of narcotics laws." Department of Justice, *1973 Annual Report of Immigration and Naturalization Service,* 12 (1973) [hereinafter cited as *1973 Annual Report*]. "Incident to the primary mission of immigration law enforcement, Service Officers seized over 98 tons of marijuana . . . [and helped seize] 1456 ounces of hard drugs . . ." (*Id.*) However, the temptation of Border Patrolmen to conduct baseless searches for contraband in areas of a vehicle where no alien could be hidden is often not resisted. *E.g. United States v. Lujan-Romero,* 469 F.2d 683 (9th Cir. 1972) (search of footlocker); *Valenzuela*

[11]The INS calls the Border Patrol one of its "enforcement arms." *1973 Annual Report* 8. The INS states that its officers often lecture at various police schools and academies and conduct courses for enforcement officers. (*Id.* at 12) Border Patrolmen wear INS uniforms with guns and drive marked cars complete with flashing red lights. When an individual dresses like a policeman, has a gun and handcuffs like a policeman, arrests people and gives *Miranda* warnings on INS printed cards like a policeman, and drives people to jail in marked cars like a policeman, it seems safe to say he is a policeman. To label him "administrative personnel" is to be "ignorant as judges of what we know as men." *Watts v. Indiana,* 338 U.S. 49, 52 (1949). *See Dyas v. Superior Ct.,* 11 Cal. 3d 628, 636 (1974) (city housing authority patrolman deemed performing a police function).

-*Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970) (search of 6-8 inch compartment in car); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969) (search of jacket); *United States v. Winer*, 294 F.Supp. 731 (W.D. Tex. 1969) (search under seat of small automobile); *United States v. Hortze*, 179 F.Supp. 913 (S.D. Cal. 1959) (search of package of cigarettes). It makes sense that a Border Patrol officer, empowered to enforce both immigration and customs laws, should be guided by the same standard of probable cause before commencing a search for aliens or narcotics.[12]

Unlike the health and safety code inspector whose primary function is to detect safety violations in order to prevent safety hazards to the public generally, the function of the checkpoints is a mixed omelet of criminal investigation to arrest and prosecute smugglers and illegal aliens as well as finding and deporting illegal aliens. In *Camara*, criminal prosecution was the rare exception. With Border Patrol checkpoints in the Southern District of California, criminal prosecution is the rule involving thousands of defendants each year.

The inspections authorized in *Camara* were unlike a criminal investigation since their purpose was to secure citywide compliance with safety ordinances. In contrast, once an individual driving a vehicle on an interstate highway well within the borders of the United States is directed off the highway by an armed Border Patrol

[12]Circuit Judge Browning, dissenting in *United States v. Almeida-Sanchez*, 452 F.2d 459, 462 (9th Cir. 1971) pointed out the anomaly of Customs officers being subject to probable cause requirements to stop and search a vehicle while the Border Patrol claimed to be free from such limitations in searching vehicles for aliens.

officer and subjected to interrogation concerning his citizenship, the status of any occupant in the car, and a search of the trunk, hood, and seat area of the vehicle, a personal criminal investigation aimed at the discovery of evidence of crime has taken place.[13] If a violation is discovered, an arrest occurs in *every* case.

4. Inland fixed checkpoints are but one of numerous Border Patrol operations to deter aliens from illegally entering the United States.

Camara recognized that there was almost unanimous agreement that the *only way* to enforce housing codes is by periodic inspection of all buildings within a geographic area. The United States Border Patrol is not limited to permanent checkpoints miles within the United States as a means of deterring illegal alien entry. The primary defense against illegal alien entry should be at the border. Acting Immigration and Naturalization

[13]In examining the criminal investigation nature of the San Clemente checkpoint, it is the *quality* of the intrusion, i.e. a forced stop and search by armed agents for illegal aliens and smugglers, that should be the focus of scrutiny rather than the penalties or *quantity* of prosecutions which result. As this Court stated in *Carroll v. United States*, 267 U.S. 132, 155-156 (1925):

> "The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected.
>
> * * * * *
>
> "The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

Service Commissioner Greene testified in *Baca* that the ideal place for stopping and deterring illegal alien entry is at the border. (B. Tr. 53, 60) Checkpoints well within the United States are merely one of many secondary supports to the watch that takes place at the border. (B. Tr. 72-73) In fact there are at least nine other Border Patrol operations which are utilized to deter and apprehend illegal aliens. (B. Tr. 111) These functions include, for example, inspections at or very near the border itself (B. Tr. 111), patrol car observation in areas somewhat removed from the immediate border areas (B. Tr. 112), farm and ranch checking (B. Tr. 112), public transportation inspections of buses, passenger trains, freight trains, and aircraft usually at transportation terminals (B. Tr. 113), metropolitan patrols (B. Tr. 113), industrial checking (B. Tr. 113), and a boat patrol and stowaway inspection program (B. Tr. 114). Other law enforcement agencies turn over a substantial number of deportable aliens to the Border Patrol. (B. Tr. 114) In fact, the total number of illegal aliens apprehended by other agencies and turned over to the Border Patrol exceeds the total number of aliens captured by all checkpoint operations. (B. Tr. 231)

In addition to these alternative operations to deter and apprehend illegal alien entrants, the Border Patrol also has the power to stop all vehicles and persons at points which constitute the functional equivalent of the border. *Almeida-Sanchez, supra* at 273; *see also United States v. Byrd,* 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973), where a point seven miles north of the international border was plausibly a functional equivalent. Many other stops and searches away from the

border may be conducted by the Border Patrol where there is "a reasonable certainty" that persons have just crossed the border illegally and entered a vehicle. *United States v. Markham,* 440 F.2d 1119 (9th Cir. 1971); *United States v. Weil,* 432 F.2d 1320 (9th Cir. 1970). Also, extended border searches are permissible anywhere in the United States if continuous surveillance of a vehicle from the border has been maintained by the Border Patrol. *Alexander v. United States,* 362 F.2d 379 (9th Cir. 1966). In addition, the Ninth Circuit has approved roving Border Patrol stops of vehicles in border areas where the agent has a "founded suspicion" to believe criminal activity is afoot.[14]

In addition, the Border Patrol has put into use "electronic intrusion alarm systems along the northern and southern borders." 1973 *Annual Report* 9 (1973). With the above considerations in mind, the Ninth Circuit Court of Appeals concluded that:

> "We are not persuaded that laws prohibiting illegal immigration will be rendered simply unenforceable should we deny to the government the power to stop and search automobiles, without probable cause or a warrant, at fixed checkpoints." *United States v. Bowen,* 500 F.2d 960, 965 (9th Cir. *en banc* 1974).

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[14] *United States v. Mora-Chavez,* 496 F.2d 1181 (1974) (car stop near border after electronic sensor activity alerted agents to possible border intrusion); *United States v. Jaime-Barrios,* 494 F.2d 455 (9th Cir. 1974) (investigative stop approved based upon agent's knowledge of high smuggling in area, lack of recognition of the vehicle or driver); *United States v. Bugarin-Casas,* 484 F.2d 853 (9th Cir. 1973) (Mexican-appearing driver of typical vehicle used in smuggling ventures which was riding low in the rear in an area of high smuggling activity).

The General Accounting Office has noted the lack of inter-agency cooperation in combating the illegal alien problem. While the Service reports that efforts to solicit the aid of the Department of Health, Education and Welfare, the Internal Revenue Service, and the Social Security Administration have begun, this is an area which if developed would not only detect aliens unlawfully within the United States, but would deny them welfare, unemployment, educational and other benefits. *See* 1973 *Hearings infra* note 24 at 115-119. Such a multi-agency approach would provide considerable deterrent impact to illegal alien entry and is a potent alternative now available.

It is with Congress, however, that the primary deterrent to the entry of illegal aliens may be found. It is no secret that the vast majority of illegal aliens entering this nation come to find employment. Legislation to make the knowing employment of illegal aliens a crime has languished in Congress for several sessions.[15] One Ninth Circuit jurist noted 21 years ago

[15]H.R. 982, the "Rodino Bill," 93d Cong., 1st Sess. (1973) passed the House of Representatives on 3 May 1973 after clearing the House Judiciary Committee by a 30 to 2 vote. The Senate has never acted on it. Current criminal statutes not only do not discourage employers from hiring illegal aliens, but have the opposite effect. Title 8 U.S.C. §1324(a)(3) makes it a felony to conceal, harbor, or shield illegal aliens. However, the last sentence of the section reads: "Provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." James D. McKevitt, Assistant Attorney General for Legal Affairs, testified before the House Judiciary Committee that:

> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appears to be condoned by the existing provision in Section 247(a)(4) that employment shall not be deemed to constitute harboring of aliens." *Hearings Before Subcommittee Number 1 of Committee on the Judiciary*, House of Representatives, 93d Cong. 1st Sess. 7 (March 7, 1974).

The problem in California is heightened by recent state court rulings nullifying *California Labor Code* Section 2805 which provided penalties for knowingly employing illegal aliens under certain conditions. In *De Canas v. Bica*, 40 Cal. App. 3d 976 (1974), a California court of appeals declared the section unconstitutional ruling that the states have no power to legislate with respect to immigration, the federal government having preempted the field.

that the "employment of . . . aliens is primarily responsible for the whole Mexican alien problem." *Herrera v. United States*, 208 F.2d 215, 218 (9th Cir. 1953) (Pope concurring). Testimony in *Baca* by Acting Commissioner Greene indicated that passage of such legislation "would be one of the greatest deterrents oncoming." (B. Tr. 90)

5. Inland permanent checkpoints not at the functional equivalent of the border are ineffective in deterring illegal alien entry into the United States.

The *Baca* hearings demonstrated that none of the operations of the Border Patrol have been effective in deterring illegal aliens from entering the United States. (B. Tr. 25, 125). The current Service Commissioner's estimate that up to twelve million aliens are illegally here (Brief for Pet. 21, n. 8) renders claims of the deterrent effect of checkpoints (Brief for Pet. 25) hollow.

Petitioner argues that inland checkpoints are essential to the effective enforcement of the immigration laws because of the highly effective nature of their operation. (Brief for Pet. 23-25) The government finds itself without a record to support these claims. We have only to look around us at the millions of illegal aliens currently living and working in the United States to see that the deterrent value of inland immigration roadblocks has been negligible. For example, for the fare of $8.37, an alien may purchase a plane ticket from San Diego to Los Angeles and completely bypass the San Clemente roadblock as well as the two other strategically located traffic checkpoints (Temecula and Oak Grove) in the Chula Vista Sector of the Southern District of California. (B. Tr. 248) Another means of successfully avoiding checkpoints, as related by the Border Patrol in *Baca* is for the aliens to be let out of the smuggling vehicle before reaching a checkpoint and simply walk around it. (B. Tr. 279) Additionally, checkpoints can be easily evaded when they close during inclement weather, heavy traffic, or due to a lack of available manpower. (B. Tr. 320-321)

All Border Patrol checkpoints during fiscal year 1973 accounted for only 8% of the deportable aliens arrested for illegal entry or violating the terms of

permits.[16] In measuring the effectiveness of the immigration roadblock at San Clemente, the ratio between those illegal aliens traversing through the checkpoint and those that are detected and arrested should be examined. Although petitioner can point to no record of this efficiency ratio, Border Patrol records and affidavits[17] indicate that San Clemente captures only about 5% of the alien traffic traversing through it north on Interstate 5.

Even more disturbing than the inefficient operation of the roadblock at San Clemente, is the militaristic

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[16]In fiscal year 1973, 655,968 deportable aliens who had either surreptitiously entered (551,328) or violated the terms of their permits (104,640) were apprehended. 1973 *Annual Report* 8-9 (1973). "In United States, during fiscal year 1973, approximately 55,300 deportable aliens were apprehended by Border Patrol agents working traffic checking operations." *United States v. Baca*, 368 F. Supp. 398, 407 (S.D. Cal. 1973). By dividing the number of apprehensions at traffic checking operations by the total number of aliens arrested, the 8% figure is achieved. It should be noted that since much of fiscal year 1973 involved roving checking operations, and because traffic checking operations involve more than permanent checkpoint operations, the percentage of aliens captured at permanent roadblock operations is a lesser percentage.

[17]In *United States v. Amado Martinez-Fuerte, supra*, n. 4, government figures reflect that about 319,000 illegal aliens traverse Interstate 5 each year. Government affidavits in *Martinez-Fuerte* also reflect that less than 17,000 allegedly illegal aliens were apprehended in 1973 at San Clemente out of the estimated 319,000 who had traversed north by that route. Thus, only about 5% of the illegal alien traffic going through the San Clemente roadblock is apprehended.

"zone defense" concept[18] of deterring and apprehending illegal aliens. Although the Acting Commissioner testified in *Baca* that the border itself is the ideal location to apprehend aliens (B. Tr. 60), the testimony of the supervisory Border Patrol agents clearly demonstrated that no real attempt at border apprehensions is made. In fact, the border is deprived of Border Patrol personnel in order to keep the inland checkpoints running. The two supervising Border Patrol agents for the two sectors (Chula Vista and El Centro) responsible for the entirety of the California-Mexican border testified that there is little or no fence between the United States and Mexico in their sectors. For example, the 75 miles of border area in the El Centro Sector only has five miles of fence. (B. Tr. 369) In the Chula Vista Sector, the fence is "frequently down" (B. Tr. 220) and at "any given moment, you can find large gaping holes in the cyclone fence." (B. Tr. 221) In some areas of well-known smuggling activity in the Chula Vista Sector such as Smuggler's Gulch, no fence has ever been erected. (B. Tr. 242) Budgetary requests

[18]The Border Patrol has evidently adopted a strategy similar to that of the Japanese Imperial General Headquarters during World War II. In seeking a defense to the American invasions of Japanese occupied islands in the Pacific, innovative tactics were devised:

> "The new tactics were to prepare a main line of resistance and defensive positions well in the rear of the beaches, place substantial forces in reserve to mount counterattacks at opportune moments, and offer token defense only at the beach." S.E. Morison, *The Two-Ocean War*, 426 (Little Brown 1963).

This strategy has proven an utter failure at stemming invasions at the first line of defense—the border. In fact, there is no real attempt to do so.

of Congress for finances to keep the fence in repair have been stricken for many years. (B. Tr. 243).

The most dramatic evidence of the Border Patrol's lack of enforcement at the border is evidenced by its manpower commitments to the border and the inland checkpoints. For example, the supervising Border Patrol agent for the El Centro Sector testified that during the midst of a typical day only ten officers were committed to cover the seventy to seventy-five miles of border in his sector. (B. Tr. 357) The supervising agent for the Chula Vista Sector indicated that during the middle of a typical week day, approximately twenty Border Patrol officers would be committed to cover the seventy miles of his sector (B. Tr. 229). Although both of the supervising agents complained that they have not been authorized enough personnel (B. Tr. 227, 400), the fact remains that more personnel is devoted to the operation of inland checkpoints than to covering the border area.[19] In fact, the number of officers devoted to

[19]In *Baca*, the *Border Patrol Handbook* was introduced as Government Exhibit 43. A permanent checkpoint like that at San Clemente requires a huge manpower commitment to operate 24 hours a day. A permanent checkpoint operation requires one or two officers to maintain a point position in the middle of the highway to refer traffic to secondary. A second officer working with an interrogator and stationed near a patrol vehicle mans the secondary position. (Govt. Exhibit 43, 9-16) Officers manning the point position must be rotated frequently to avoid fatigue inherent in this type of operation. (*Id.* at 17) Personnel must be available in case a vehicle runs through the checkpoint or turns around before arriving. (*Id.* at 18) To guard against aliens walking around the checkpoint, frequent patrols on both sides of the checkpoint are required. (*Id.* at 3) *See also* B. Tr. 291. Richard E. Batchelor testified that twenty officers are assigned to the immediate border area in the Chula Vista Sector on a typical week day; forty-seven are stationed at the San Clemente checkpoint. (B. Tr. 229, 267).

border duty is insufficient to even respond to electronic sensor alerts which indicate the possibility of aliens crossing the border. (B. Tr. 227)

The proof of the current ineffective border placement of officers was demonstrated in 1969 during "Operation Intercept." At that time a significant manpower commitment was made to the border area with the immediate effect of acting as an effective deterrent to aliens from Mexico illegally entering the United States. (B. Tr. 258, 435). This result was obtained simply by increasing the number of officers at the border by an increment of 57. (B. Tr. 437)

In sum, the "zone defense" articulated by the Border Patrol in *Baca* reveals a mere token commitment of officers to the vast stretches of the immediate border area. This is true even though the primary defense is said to be at the border. (B. Tr. 53) The "zone defense" concept (B. Tr. 162, 166) provides the government a bootstrapping argument by which it claims it is impossible to efficiently patrol the Mexican-American border, but because of its reliance on inland checkpoints it makes no manpower commitment there. When the Border Patrol's commitment to the so-called "first line of defense" is at best token, it is understandable why so many deportable aliens are arrested at inland checkpoints and why millions of others escape detection. Only thirty officers are devoted to patrolling the entirety of the California-Mexican border on a typical day. (B. Tr. 229, 357) At the same time, forty-seven officers are needed for the daily operation of the San Clemente checkpoint which is but one of the nine checkpoints in California. (B. Tr. 267) Until the government makes a sincere commitment to

apprehending and deterring aliens at the border, it cannot point to self-created manpower shortages there to justify the existence of inland checkpoints.

6. Inland checkpoints in excess of 25 miles from the border cannot be justified because temporary visitors from Mexico with I-186 cards allegedly violate the terms of their documents.

The government, in support of its inland checkpoint operations, states that only a roadblock located in excess of 25 miles north of the international border will allow for the detection of aliens with local passports (I-186) who violate the terms of their cards. (Brief for Pet. 26) The Immigration and Naturalization Service states, however, that only an insignificantly small number of aliens crossing the border with cards violate the terms of their entry cards:

> "There is very little correlation between the problems relating to border crossers and illegal aliens. In the first instance, the problems relating to the border crossers are very minimal. The non-immigrant who enters presenting Form I-186, may not work lawfully in the United States and in order to go beyond the 25-mile limit, he must first secure permission from the admitting official at which time he is issued a special form. On each occasion that he is questioned by an immigration officer, he must present his entry document and if found working, he is amenable to deportation proceedings . . .
>
> "The illegal alien or 'wetback' is something else. He enters the United States surreptitiously, usually under cover of darkness. He employs the assistance of smugglers if he has the funds, and has

nothing to lose if he is apprehended unless it can be established that he is an aggravated violator, in which case he might be prosecuted for illegal entry." *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary of the House of Representatives,* 93d Cong. 1st Sess., 160 (1973).

Resort to the record of apprehensions at checkpoints demonstrates that I-186 card holders are a negligible factor in checkpoint apprehensions. In the El Centro Sector, the total number of deportable aliens arrested in fiscal 1973 was 23,125. (B. Tr. 347) During that time period, 1,098 deportable aliens were arrested for violating their terms of their entry documents. "Some of these would be people who entered with what we call the I-186, . . ." (Br. Tr. 348) Even assuming all of the latter to be I-186 card holders, and assuming all of the apprehensions occurred at checkpoints,[20] this amounts to less than 5% of the total number of deportable aliens apprehended in the El Centro Sector. In fiscal year 1973, 1,440,277 Mexican temporary visitors were admitted to the United States pursuant to Section 101(a)(15)(B) of the Immigration and Nationality Act, i.e., with I-186 cards. Of this total, only 4,975 or .003% were apprehended at alien checkpoints within

[20]Of the 23,125 deportable aliens apprehended in the El Centro Sector during 1973, traffic checking operations accounted for a total of 3,825 or about 16%. If this ratio of checkpoint apprehensions to total apprehensions holds true for I-186 card holders, then traffic checking operations accounted for less than 170 such apprehensions during fiscal year 1973.

the United States while violating the terms of their admission.[21]

The evidence itself suggests the weakness of the government's argument that checkpoints are needed to apprehend I-186 card holders violating the terms of their documents. Even the INS agrees that there is no correlation between the few violations by such card holders and the problems of illegal aliens. Further, the alternatives for deterring and detecting illegal aliens, previously discussed *supra* at section IB(4), are equally available to detect and deter the unauthorized use of an I-186 card.

C. The Traditional Fourth Amendment Definition of Probable Cause Applies to Warrantless Stops and Searches at Immigration Checkpoints not Located at the Functional Equivalent of the Border.

In *Almeida-Sanchez* this Court looked to traditional Fourth Amendment cases involving warrantless vehicle stops and searches in measuring the legality of the government action: "Automobile or no automobile, there must be probable cause for the search." 413 U.S. 269. The opinion relied upon *Carroll v. United States,* 267 U.S. 132 (1925), and subsequent automobile search

[21]1973 *Annual Report* 58; B. Tr. 92. Dividing the number of temporary Mexican visitors lawfully admitted but apprehended at checkpoints while violating the terms of their entry (4,975) (B. Tr. 92 and Gov't. Exhibit 12) by the total number of such Mexican visitors lawfully admitted (1,440,277) (1973 *Annual Report* at 58) during fiscal 1973 reveals that .003% of the persons holding I-186 cards were apprehended at checkpoints violating the terms of their permits.

cases requiring probable cause to search a vehicle. 413 U.S. 269, n. 1.

Justice Powell joined in the opinion of the majority stating "that none of our Fourth Amendment decisions supports the search conducted in this case, . . ." *Id.* at 275. His concurring opinion concerned an issue not presented by the facts of *Almeida-Sanchez* or this case, whether a roving search would be sustainable if it were based on the functional equivalent of probable cause and a warrant.

1. There is no authority for petitioner's assertion that warrantless, causeless stops and searches at the checkpoints may be based upon a Border Patrolman's conclusion that the functional equivalent of probable cause exists to believe that vehicles containing immigration law violators will pass through a checkpoint.

This Court has only sustained warrantless administrative inspections where a detailed authorizing statute exists to offer the protections to the citizenry that a warrant ordinarily offers. The government asserts that the public is protected when the Border Patrol, acting under a general statute, 8 U.S.C. §1357(a)(3), which offers no guidelines or limitations on its conduct, operates permanent checkpoints wherever and whenever the agency or one of its officers determines there to be a "functional equivalent" of probable cause to believe that immigration violations are being committed.

The Fourth Amendment requirement of reasonableness in searches is the standard by which a decision to search is tested. In the criminal context, probable cause requires the showing that something connected with criminal conduct will probably be found in the place to be searched. In the administrative context, inspections are deemed reasonable where they are preventive in purpose and reasonable legislative and administrative standards exist for conducting such inspections. With respect to Border Patrol checkpoints such as at San Clemente, both criminal investigative and administrative purposes exist. However, the reasonableness requirement is not met in either context. There is no demonstration that the cars searched more probably than not contain aliens, nor is there an authorizing statute or administrative regulation containing standards for the time, place, and scope of such inspections. *See* Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 *Notre Dame Lawyer* 879 (April 1974). In fact, as petitioner concedes, an individual Border Patrolman standing in the middle of Interstate 5 stops all traffic for a cursory visual inspection and routinely chooses any vehicle he desires for a more intrusive stop, interrogation, and search at secondary. (Brief for Pet. 32)

2. Checkpoint stops and searches involve multiple intrusions upon the constitutionally-protected rights of an entire traveling public.

A person traveling in a vehicle on an interstate freeway at 55 miles per hour has a reasonable expectation of privacy that he shall not be forced by a

show of authority to come to a complete halt and be directed off of the highway, interrogated by a Border Patrolman, and ordered to open the hood and trunk of the automobile. There are at least five related privacy interests protected by the Fourth Amendment which are invaded by such checkpoint procedure.[22]

1) Freedom from arbitrary governmental interference.

The most important freedom protected by the Fourth Amendment is the "protection of the privacy of the individual, his right to be let alone; . . ." *Davis v. United States*, 328 U.S. 582, 587 (1946). As emphasized by this Court in *Almeida-Sanchez*, *supra*, at 274, Fourth Amendment rights " 'are not mere second class rights but belong in the catalogue of indispensable freedoms.' " (Quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting))

2) An individual's liberty of positioning, that is the right to decide to remain or go elsewhere.

A person whose vehicle is stopped by law enforcement officers and whose freedom to drive away is restrained is as effectively seized as the pedestrian who is detained. *Terry v. Ohio*, 392 U.S. 1, 16, 19 n. 16 (1968). Unlike the fact situation in *Terry v. Ohio*, *supra*, or *Adams v. Williams*, 407 U.S. 143 (1972), which involved detentions of stationary individuals on the street, the stop, interrogation, and search procedure at a checkpoint invades the right of the citizenry to decide for themselves where and when they shall travel.

[22] *See* Note, *Non-Arrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 *Stan.L.Rev.* 865, 875-878 (June 1973) where the privacy interests articulated here are discussed in the context of general automobile stops by peace officers.

The Fourth Amendment protects this "right of personal security against arbitrary intrusions . . . [and] if times have changed, reducing *every man's scope to do as he pleases* in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (Emphasis added).

3) An individual has a liberty of movement, that is, free passage without interruption.

This significant freedom, found violated in *Almeida-Sanchez*, is abridged in the same manner by the stop and search procedure in respondent's case. Freedom of movement has been repeatedly recognized and protected by this Court. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Brinegar v. United States*, 338 U.S. 160, 177 (1949); *Henry v. United States*, 361 U.S. 98, 103 (1959); *Almeida-Sanchez*, *supra* at 274-275.

4) An individual has a Fourth Amendment interest in avoiding those whom he does not wish to encounter.

Part of the individual's "right to be let alone" certainly includes a right to be free from arbitrary confrontations with law enforcement officers which involve interrogation and search of one's automobile. This Court recognizes that if permitted such "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, . . ." *Davis v. Mississippi*, 394 U.S. 721, 726 (1969).

5) The occupant of a moving automobile has a privacy interest to be free from a stop and visual

inspection of the car interior by a Border Patrol officer at a checkpoint.

The primary object of the Fourth Amendment is the protection of privacy. *Katz v. United States,* 389 U.S. 347, 350 (1967). This Court has recognized that "the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free from unreasonable governmental intrusion." *Cardwell v. Lewis,* 417 U.S. 583, 591 (1974). The combined factors of a vehicle's enclosed nature and rapid movement on a freeway affords the occupant greater expectations of privacy than if the vehicle is stationary as in *Cardwell v. Lewis, supra,* or if the individual is a pedestrian on a sidewalk. *Terry v. Ohio, supra.* Privacy expectations of a moving vehicle include not only the interior, but also the areas under the hood and trunk. These expectations are violated when a Border Patrolman, without the least objective reason to suspect occupants of a vehicle to be aliens, orders the car off the highway for an interrogation of the passengers and search of the vehicle.

All five of the above Fourth Amendment privacy interests of the traveling public are violated when, as in respondent's case at San Clemente, one's car is ordered off an interstate freeway for an interrogation of the occupants and search of the trunk. If the Border Patrol officers are to have the right to interfere with the Fourth Amendment rights of a nation of motorists, that right must be conditioned upon compliance with the probable cause and warrant requirements of the Fourth Amendment. Fourth Amendment protection "reaches all alike, whether accused of crime or not." *Weeks v.*

United States, 232 U.S. 383, 392 (1914). It is no justification for this conduct that the intrusions are "modest." (Brief for Pet. 27) Mr. Justice Bradley's admonition in *Boyd v. United States,* 116 U.S. 616, 635 (1886), and repeated in *Coolidge v. New Hampshire, supra* at 454, is worthy of repetition here:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of that right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and any stealthy encroachments thereon."

The San Clemente checkpoint exhibits all of the abuses and shortcomings which irritated the colonists and continue to irritate many people today. As one commentator recently noted, arbitrary automobile stops involve:

> "... an invasion of a motorist's protective privacy which involves, as it must, the prying eyes of uniformed authority. It is an invasion of personal security involving a seizure and temporary detention. It is an investigative intrusion aimed at the discovery of a criminal violation. Finally, it is a thoroughly arbitrary intrusion without judicial supervision before or after the fact." Note, *Automobile Spot Checks and the Fourth Amendment,* 6 *Rutgers-Camden L.J.* 85, 111 (Summer 1974).

3. The Criminal-Administrative Nature of the San Clemente Checkpoint, where the Focus is to Apprehend Illegal Aliens of a Certain Race, Requires that an Evidentiary Basis exist for the Stop and Search of Each Vehicle to Avoid Abuse.

If this Court agrees with the respondent that traditional notions of probable cause apply with respect to warrantless Border Patrol checkpoint searches as well as roving searches, the high potential for abuse during such activity will be mitigated. Immigration inspection stops, which are warrantless and allow agents unbridled discretion in selecting their targets for the more intrusive interrogation and vehicle search, provide opportunities for abuse. This Court has held that the potential for abuse is a significant factor in evaluating privacy invasions. *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). As Professor Greenberg has recently pointed out:

> "Harrassment is not confined to inspections motivated solely by personal spite and bad faith, but includes overzealous enforcement. The latter problem is considerably more acute . . . [where] one of the main aims of the inspection scheme is to serve as a credible deterrent. Government use of the search power to deter, unchecked by neutral inquiry into the necessity for a given level of deterrence, creates the possibility of substantial abuse, since it is undeniable that the greater the governmental abuse, the greater the deterrent effect." Greenberg, *The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 *Cal. L. Rev.* 962, 1023 (1973).

At the San Clemente checkpoint on Interstate 5, an entire traveling public of over ten million cars per year is subjected to privacy invasions, although not all of the drivers and occupants are subjected to the same degree of intrusion. The unequal treatment at the checkpoint, not based on an articulated evidentiary foundation of reasona' le suspicion of illegal conduct, leaves the decision of whom to subject to interrogation and search completely within the discretion of the Border Patrolmen who may exercise that discretion for other than proper reasons.

The most obvious potential for abuse at permanent checkpoints such as at San Clemente is the invidious discrimination against the millions of individuals of Latin American descent traveling on the highway. Much of the traffic through the checkpoint involves recently immigrated Mexicans returning from visits to relatives in Mexico to their Los Angeles homes. (B. Tr. 155) The Imperial Valley, located in the Southern District of California, is approximately 52% Mexican-American. (B. Tr. 346) The Ninth Circuit has taken judicial notice "that there is a large Mexican American population in the Oceanside area. . . . [and] it is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." *United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).[23] Oceanside is just 18 miles to the

[23] *See also United States v. Camacho-Davalos*, 468 F.2d 1382, 1383 (9th Cir. 1972) (border patrol agent's description of occupants of a truck as Mexican appearing Spanish-speaking and without immigration documents "fits thousands of American citizens").

south of the San Clemente checkpoint on Interstate 5. The major cities in Southern California contain huge populations of persons validly residing in the United States who happen to be of Latin American ancestry. Indeed, Los Angeles, California has "the largest Mexican population of any city on the continent, with the exception of Mexico City itself." *Fernandez v. United States*, 321 F.2d 283, 286 (9th Cir. 1963).

The focus of search at the San Clemente checkpoint is on illegal aliens from Mexico. In fiscal year 1973, the Immigration and Naturalization Service reports that 480,588 of the 498,123 deportable aliens apprehended by the Border Patrol were from Mexico. In the Chula Vista Sector, 126,206 of the 128,889 deportable aliens located were from Mexico which constitutes 98% of all illegal alien entrants apprehended. Adding apprehensions from the other Latin American countries, the figure becomes 99%.[24] When virtually every deportable alien located at the San Clemente checkpoint is of apparent Latin American extraction, it is difficult to accept the Service's position that race or skin color are not determinate factors in deciding whether or not to refer a vehicle off Interstate 5 for an interrogation and

[24]These figures may be found in a statistical breakdown of deportable aliens located by nationality in fiscal year 1973 provided by the U.S. Department of Justice, Immigration & Naturalization Service to the Judiciary Committee of the House of Representatives. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary, House of Representatives*, 93rd Cong. 1st Sess., p. 125 (20 September 1973).

search.[25] The apprehensions of aliens of Latin American descent at the checkpoint refute this contention.

With a substantial traveling public of lawfully-admitted Latin American residents and citizens passing through the checkpoint, it is apparent that referrals to the secondary area for interrogation and search are based upon skin color. This constitutes an invidious discrimination and a denial of equal protection of the laws to a minority population.

The selection of a vehicle for interrogation and search based upon the arbitrary and unjustified standard of race is as violative of equal protection and due process as the discrimination against race in licensing in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); the discrimination against race in the study of law in *Gaines v. Canada*, 305 U.S. 337 (1938); the discrimination against race in jury service in *Hernandez v. Texas*, 347

[25]At the *Baca* hearing, Acting Commissioner Greene testified that race or skin color was not necessarily the key criteria used by the point officer in referring occupants and their vehicles to secondary. (B. Tr. 75) Rather, the so-called "break-in-the-pattern of traffic" is alleged to be the basis upon which a point officer refers vehicles to secondary for interrogation and search. (B. Tr. 292) When asked to define that phrase, the response of Agent Batchelor was that "we have reason to believe that the occupants of that particular vehicle are indeed aliens who are in the United States illegally." (B. Tr. 293) The "break-in-the-pattern" thus means that the point officer by visually inspecting the occupants of the vehicle is of the belief that illegal aliens are in the vehicle. Since almost all of the illegal aliens apprehended in the area of the San Clemente checkpoint are of Latin American descent, it is difficult to believe that the skin color and facial features of the occupants are not the key criteria used by the point officer in referring vehicles to secondary for how else is the "determination" to be made that illegal aliens are in the vehicle simply based on a visual inspection?

U.S. 475 (1954); the discrimination against race and segregated school attendance in *Bolling v. Sharpe*, 347 U.S. 497 (1954); or the discrimination against race in miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967).

In this context, it is essential that the Border Patrol be required to have an articulated evidentiary basis to support any stop, interrogation of persons and search of a vehicle at a checkpoint. At present, there are no statutory or administrative regulations stating criteria for referrals to secondary for interrogation and a warrantless search. (B. Tr. 65, 201-202, 208, 380-381) The point officer has complete discretion to refer any particular vehicle to secondary. With deportable Mexican aliens the object of the search, such arbitrary referrals to secondary may be "a major source of friction between the police and minority groups." *Terry v. Ohio*, 392 U.S. 1, 14 n. 11 (1968), quoting the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* 183 (1967).[26] These sensitive considerations have led virtually every commentator to agree with this Court's holding in *Almeida-Sanchez* that at least probable cause (and perhaps a warrant) must exist to support the stop and search of vehicles for aliens. *See* Note, *Fourth Amendment Applications to Searches Conducted by Immigration Officials*, 38 *Albany L. Rev.* 962, 975 (1974); Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for*

[26]"The hatred and fear of the police, whether overt or hidden, felt by many Negroes, Puerto Ricans and Mexican-Americans cannot be overstated." *American Civil Liberties Union, Police Power and Citizens' Rights* 11 (1967). *See also, e.g., National Advisory Commission on Civil Disorders, Report* 93 (1968).

Aliens Take on a New Look, 10 *Cal.WestL.Rev.* 657, 672 (Spring 1974); Tribe, *The Supreme Court: 1972 Term*, 87 *Harv.L.Rev.* 1, 204 (1973); Comment, 27 *Vand.L.Rev.* 523 (1974); Comment, 7 *Vand.Jour.of Transnational Law* 762, (1974); Note, *Automobile License Checks and the Fourth Amendment*, 60 *Va.L.Rev.* 666, 668-689, n. 107 (1974). Similar considerations have caused the drafters of the *Model Code of Pre-Arraignment Procedure*[27] and other commentators[28] to require an evidentiary basis for automobile stops and searches. The reporters for the *Model Code* stress that:

> "There are two different sorts of costs associated with the stop. First, there is the imposition upon innocent persons even when the police stay within the terms of the authority granted. Such imposition is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general. Second, there is the danger that the stop is susceptible to abuse. It may

[27]*Model Code of Pre-Arraignment Procedure* Section 110.2(2) (Official Draft No. 1, 1972). The *Model Code* would only suspend the reasonable suspicion requirement for stops at roadblocks during emergency situations.

[28]Note, *Inspections by Administrative Agencies: Clarification of the Warrant Requirement*, 49 *Notre Dame Lawyer* 879 (Apr. 1974); Note, *Automobile Spot Checks and the Fourth Amendment, Rutgers-Camden L. Jour.* 85 (Summer 1974); Note, *Non-Arrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 *Stan. L. Rev.* 865 (June 1973); Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 *Cal. L. Rev.* 907 (1963); Greenberg, *The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 *Cal. L. Rev.* 62 (1973).

be used not for its authorized purpose but to harass persons to whom the police may be hostile or about whom they feel a generalized suspicion or apprehension—e.g. youths, unconventionally attired persons, Negroes in white area, whites in Negro areas. And the stop and frisk carry the special potential that they may be used to circumvent constitutional restrictions on search and seizure by providing a pretext to search for narcotics and gambling slips. The danger of abuse is argued to be particularly serious, since the stop must be predicated on a more permissive standard than arrest thus making it more difficult to confine the authority to proper cases and to ascertain after the fact whether an abuse has indeed taken place."[29]

II.

ADVANCE JUDICIAL APPROVAL EVIDENCED BY A WARRANT UPON A SHOWING OF PROBABLE CAUSE FOR THE OPERATION OF AN IMMIGRATION CHECKPOINT IS THE ONLY CONSTITUTIONAL PROCEDURE AUTHORIZING STOPS AND SEARCHES OF VEHICLES BY THE UNITED STATES BORDER PATROL.

In *Almeida-Sanchez*, this Court held that probable cause, as traditionally defined, is a constitutionally sufficient basis for an automobile search for aliens absent even a warrant. However, if the functional equivalent of probable cause concept is to be deemed a constitutionally adequate predicate for a vehicle search for aliens, the determination of functional equivalency is

[29] Note 27 *supra* at § 110.2, Comment 4(b).

one for a judicial officer and conventional warrant procedure. This section of the brief analyzes the warrant requirement assuming such a showing of equivalency.

A. The Fourth Amendment Requirement That Searches Be Authorized by a Warrant Issued Upon a Showing of Probable Cause Applies to Searches Conducted at Roving, Temporary, and fixed Immigration Checkpoints.

In *United States v. United States District Court*, 407 U.S. 297 (1972), this Court speaking through Justice Powell stated:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will be preserved through a separation of powers and division of function among the different branches and levels of Government. . . . prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." (At 317-318)

Only Justice Powell spoke to the warrant issue in the context of immigration searches conducted by roving Border Patrolmen in *Almeida-Sanchez*, 413 U.S. 275-285. After discussing the issue of probable cause to conduct such searches, Justice Powell turned to the issue of "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara v. Municipal Court*, 387 U.S. 523, 533

(1967)." (*Id.* at 282) In finding that obtaining a warrant to conduct such searches in areas near the border would not frustrate the governmental purpose behind the searches, Justice Powell recognized that "the judicial function here would necessarily include passing on just such a basic [agency] decision." 413 U.S. 283.

> "Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time." 413 U.S. at 283.
>
> * * *
>
> "There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant." 413 U.S. at 283, n. 3.

The government argues that while it has no disagreement with the concept of search warrants issuing to authorize roving Border Patrol searches in areas near the border, it believes there are "significant differences between a roving patrol or 'area search operation' . . . on the one hand and a fixed checkpoint operation on the other hand, and that those differences should lead to different results on the question of the need for a warrant." (Brief for Pet. 34)

However, the Fifth, Ninth, and Tenth Circuits, the courts which deal with immigration cases on a daily basis, have all agreed that the ruling of *Almeida-Sanchez* is applicable to fixed checkpoint searches as well as roving patrol searches. As the Fifth and Ninth Circuits have

noted, "the distinction between a checkpoint and a roving patrol is not important." *United States v. Speed*, 489 F.2d 478, 480 (5th Cir. 1973); *rehearing opinion*, 497 F.2d 546 (1974); *United States v. Bowen*, 500 F.2d 960, 967 (9th Cir. *en banc* 1974). The Tenth Circuit agrees that ". . . a search at a fixed checkpoint of an automobile for aliens without a warrant and without probable cause, 98 miles away from the external boundary, is unlawful, unless the particular fixed checkpoint be in fact a functional equivalent of a border search." *United States v. King*, 485 F.2d 353, 359 (10th Cir. 1973); *see also United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973). In short, these circuits agree that there are no facts of constitutional dimension which distinguish roving and permanent checkpoint searches. A rational search warrant procedure is at least as feasible with fixed checkpoints as with roving. Similar questions involving the important balancing of legitimate interests of law enforcement with the citizenry's protected Fourth Amendment rights are involved. The permanent checkpoint stops and searches present the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive. As noted in *Camara, supra*:

> "This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U.S. 532-533.

B. The Absence of Statutory or Regulatory Guidelines Limiting the Discretion of the Border Patrol in Selecting Target Vehicles for Search Requires the Protection of a Warrant.

The warrant requirement of *Camara* may not be jettisoned as petitioner argues. Warrants may be dispensed with in the purely administrative inspection area only if two conditions are met:[30] 1) the authorizing statute must be specific and contain standards limiting the time, place, and scope of the inspections; and 2) the scheme of regulation is so pervasive that those subject to inspection will have been put on notice by their own familiarity with the statutes and the frequency of visits by the inspector. If these two conditions are met, the purposes of a warrant as described in *Camara* (judicial preview of police-citizen contacts, notice of the need, scope, and authority of the inspector) are satisfied. In the case of Border Patrol inspections at checkpoints, neither of the above two conditions are met. There is no authorizing statute containing precise standards limiting the time, place, and scope of inspections. *See* 8 U.S.C. §1357(a)(3); 8 C.F.R. 287.1. Nor is the scheme of regulation so pervasive that those subject to inspection (i.e. the traveling public between San Diego and Los Angeles on Interstate 5) are put on notice by their familiarity with the statutory scheme and the frequency of inspection. In fact, the Border Patrol itself concedes that much of

[30]*See* Note, "*Inspections by Administrative Agencies: Clarifications of the Warrant Requirement,*" 49 *Notre Dame Lawyer* 879 (April 1974) which discusses in detail the arguments in this section.

the traveling public is unaware of Southern California's functioning permanent checkpoints. (B. Tr. 281) As stated in *Colonnade, supra,* "When Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." 397 U.S. 72-77. If there is a unity to this Court's pronouncements in the area of administrative inspections, it is that absent a specific statute of authorization particularly describing the functions of the inspectors, a warrant will be required to conduct the inspection.

C. Because Millions of Citizens Come Into Contact with Law Enforcement Officers at the San Clemente Checkpoint Each Year, the Need for a Warrant Procedure is More Important in This Context than with Roving Stops and Searches.

The important factors which distinguish permanent checkpoints from roving patrols are those which make plain the necessity for a warrant procedure prior to conducting searches at a permanent checkpoint. Unlike a roving patrol which involves only a few subjects in the stop and search procedure, the establishment of a permanent checkpoint such as at San Clemente involves an intrusion on an entire traveling public. The Border Patrol estimates that in excess of ten million vehicles traverse through the San Clemente checkpoint each year. With so many citizens coming within the ambit of the checkpoint, the need for a warrant procedure is paramount. This is especially true where much of the traveling public in Southern California does not

anticipate a permanent roadblock located on an interstate freeway between San Diego and Los Angeles. (B. Tr. 281) Further, the Border Patrol recognizes that at permanent checkpoints: "So many law-abiding citizens must be contacted to discover those who are violators . . ."[31] that great care must be taken in its operation.

Petitioner asserts that with respect to permanent checkpoints, a warrant procedure cannot effectively protect Fourth Amendment rights. However, a recent government brief before the Ninth Circuit defends the use of area warrants at the San Clemente checkpoint because it protects Fourth Amendment rights by:

> "1) Insuring that the statute and regulations relied upon do allow the operations at all;
>
> 2) Establishing that the procedures employed are reasonable, being as close to the border as practicable and providing a minimal level of intrusion to the innocent traveling public;
>
> 3) Dictating that the actual inspection technique used be as limited as possible . . . .
>
> 4) Limiting the time span of the warrant to ten days to allow the judicial branch to review the evidence presented to insure that the justification for the operation has apparently resulted in the Border Patrol being even more careful of the vehicles that they refer to secondary at the checkpoint."[32]

In addition to those reasons enumerated above, a warrant further protects Fourth Amendment interests at checkpoints by:

[31] Government Exhibit 43, 9-20.

[32] Government's brief in *Martinez-Fuerte*, note 4, at 43-44.

5) apprising the subject of a stop, interrogation, and search that the Border Patrol officer is acting pursuant to lawful authority because often the traveling public is unaware and does not expect to be confronted with a roadblock on an interstate freeway within the interior of California. (B. Tr. 281) A warrant serves a meaningful function by evidencing the authority to operate such a checkpoint operation and prescribing in writing the lawful limits of the inspector's power to stop, interrogate, and search.

6) As with roving patrol stops and searches, the point officer at a fixed checkpoint has complete authority to select which vehicles passing through the checkpoint will be subject to the more intrusive interrogation or search than that conducted at the primary stop. As stated in *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. *en banc* 1974): "Since not all vehicles passing through a checkpoint are stopped, and since not all vehicles stopped are searched, the officer at the checkpoint still retains a good deal of discretion to 'single out' some travelers for stops or intrusive searches." A warrant authorizing the functioning of a Border Patrol checkpoint could serve the important function of delineating with specificity those criteria upon which a Border Patrolman may act in directing vehicles off the highway into a secondary area for interrogation and search.

7) A warrant will instruct the Border Patrol officer regarding the time, scope, and intensity of any interrogation of persons and search of a vehicle.

8) The operation of a permanent checkpoint may constitute a hazard to traffic during times of inclement weather, a lack of manpower or when the flow of traffic becomes heavy. Instructions

introduced into the warrant may mandate checkpoint closure when such conditions pose a hazard to the general traveling public.

9) Permanent checkpoints on major interstate highways involve the stopping of commuter traffic, tourist traffic, business traffic, and public transportation. A warrant would be utilized to insure that public forms of transportation such as buses[33] not be stopped and each passenger interrogated as to citizenship when the driver indicates that the bus originates from a non-border city.

10) A final reason for the intervention of a warrant procedure is the ephemeral nature of permanent and temporary checkpoints. Not only is there some dispute as to the length of time a checkpoint stays open, but the Service apparently is not clear where all of them are located. Petitioner has supplied this Court with two maps indicating the location of Border Patrol checkpoints throughout the Southwestern United States. (Brief for Pet. 24, n. 11) It may be misleading to examine these maps without understanding that none operate all of the time. *Baca* revealed that the three checkpoints in the Chula Vista Sector were open the following percentages of time: San Clemente (70%); Temecula (80%); Oak Grove (20%) (B.Tr. 250-251). The government exhibits also reflect a temporary Border Patrol checkpoint approximately two miles north of Tecate, California, at the junction of Telegraph Road and S-94 (Map No. 1, checkpoint 4; Map No. 2, checkpoint 6). Agent Richard Batchelor, Deputy Chief Patrol Agent of the Chula Vista

[33]The inspection of a bus at a permanent checkpoint involves an armed officer actually entering the bus and inspecting all passengers. (B. Tr. 187); *see also* Government Exhibit 43, 9-16.

Sector, testified that the three previously mentioned checkpoints are the *only* checkpoints in his sector. (B.Tr. 144, 148-149); see *Baca, supra*, 368 F.Supp. 410-412. Counsel for respondent, who have some familiarity with this geographic area, are unaware of any such checkpoint.

In the El Centro Sector, there are nine such checkpoints. *Id.* at 416-418. Yet petitioner's Map No. 1 has eight checkpoints marked in this area, three of which were not mentioned in the *Baca* hearings perhaps due to the fact that they are California Agricultural Inspection Stations on the Arizona-California border. Four checkpoints noted in *Baca* are not on Map No. 1. Map No. 2 has only five checkpoints for the El Centro Sector. Wherever these checkpoints are in fact located and whatever their number, the point is that none are open for more than about half the year. For example, three checkpoints reflect the following percentages of time open: S-86 (65%); S-78 (25%); S-22 (50%). Several are open only a few hours each year. *Id.* at 418. The fate of the California Agricultural Inspection Stations at Winterhaven, Blythe, and Vidal Junction is not within the scope of the issues in this case and should not be considered immigration checkpoints as the petitioner suggests.[34]

[34]The petitioner's maps and brief unnecessarily imply that an affirmance in this case will have an adverse affect on all other checkpoints. There is no record for such an inference since some checkpoints are valid as functional equivalents of the border (*e.g.*, Map 1, No. 40, *United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973); or because they only operate when specific information exists that smuggling vehicles are headed toward a checkpoint (*e.g.*, Map 1, No. 8, *Baca, supra* at 418); or when operated pursuant to a valid warrant. Where, however, a checkpoint has no nexus to the border and stops and searches

Given the differences of checkpoint location and existence between petitioner's Map 1 and 2 and the *Baca* opinion, a warrant procedure would guarantee the traveling public a degree of certainty as to where and when checkpoints are established. The fact that several checkpoints are open only a few hours each year and others only several days is a powerful argument for having a neutral magistrate authorize initiation of such activity rather than law enforcement officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Finally, the best response to petitioner's argument that a warrant procedure cannot be applied to the checkpoints is that such warrants are currently issued in various federal districts throughout the southwestern United States. With respect to the San Clemente checkpoint, warrants have been issued continuously since 22 June 1974 authorizing its operation.[35] If the

are made without a suspicion of the illegal status of the occupants, it operates in violation of the Fourth Amendment. As the Fifth Circuit recently stated in *United States v. Speed*, 497 F.2d 546, 548 (1974);

> "The government cannot fulfill its burden of demonstrating a nexus with the border merely by showing that many violations occur in the vicinity of the search. As this court held more than a year before *Almeida-Sanchez*, 'proximity to the frontier does not automatically place a 100-mile strip of citizenry within a deconstitutionalized zone, with its attendant de-escalation of Fourth Amendment requirements. [citation omitted].'"

[35]The government contends that these warrants only authorize stopping the vehicles for purposes of inquiry. (Brief for Pet. 41, n. 21) The warrants issued from 22 June to 11 July 1974 all included provisions authorizing the inspection of the vehicle according to the Brief for the United States in *Martinez-Fuerte, supra*, note 4 at 43.

government found such warrants to frustrate the purpose of the checkpoint, it would not seek their issuance and repeated reissuance. The government's actions (in continuously seeking and obtaining area inspection warrants for permanent checkpoints) speak louder than words (Brief for Pet. 33-43).

One of the more disturbing arguments suggested by petitioner is that the Fourth Amendment rights of the citizenry violated by warrantless, causeless searches at checkpoints may be adequately protected at post-intrusion motion to suppress hearings. (Brief for Pet. 34) However, the millions of innocent citizens who come into contact with the checkpoints each year have no realistic forum available to contest warrantless, causeless, arbitrary stops, interrogations, and searches at permanent checkpoints.[36] To adopt the suggestion of

[36]The idea of civil suits initiated by the wronged citizenry is not only impracticable, but unrealistic:

> "Where are the lawyers going to come from to handle these [civil suit] cases for the plaintiffs? *Gideon v. Wainwright* [372 U.S. 335 (1963)] and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases?
>
> Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some re-

the petitioner would effectively turn the Fourth Amendment on its head by permitting only those charged with crimes a forum to litigate. The thrust of the warrant requirement of the Fourth Amendment is that *prior* to the contemplated intrusion by governmental agents, a neutral and detached judicial officer shall evaluate the reasonableness of the information and the contemplated intrusion. *Ex post facto* review effectively wipes out the two distinct constitutional protections served by the warrant requirement: 1) to eliminate altogether searches not based on probable cause and 2) that those searches deemed necessary be as limited as possible by requiring a particular description of the persons and items to be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971).

Warrantless permanent checkpoint operations involve precisely the same evils that were condemned as unconstitutional in *Almeida-Sanchez*. The need for prior judicial authorization by warrant is more important for permanent checkpoints than roving checks because of the millions of persons coming within the ambit of checkpoint operations where no regularized procedure exists to determine whom shall be searched. (*Cf.* Brief for Pet. 35) Contrary to the assertions of petitioner, a

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sources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police." Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L.R.* 349, 430 (Jan. 1974).

warrant procedure is now in effect in the Southern District of California. (Brief for Pet. 38)[37] The judicial and administrative resources expended to issue these warrants, which the petitioner contends is unjustified (*id.*) are exactly the efforts contemplated of law enforcement officers and the judiciary by the Fourth Amendment:

> "Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson [requiring judicially authorized warrants] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations–the 'competitive enterprise' that must rightly engage their single-minded attention *Cf. Mancusi v. DeForte*, 392 U.S. 364, 371." *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971).

[37]The petitioner asserts that the judges of the Southern District of California have reached conflicting decisions concerning the lawfulness of checkpoint stops issued pursuant to area-type warrants. (Brief for Pet. 41) However, the issues in those cases involved not only the propriety of the warrant, but also the establishment of probable cause (or its functional equivalent) to justify its issuance. Thus, it is misleading to state that warrants are being denied because of the existing uncertainties concerning their lawfulness under the Fourth Amendment. (Brief for Pet. 41) The issues with which the judges of the Southern District of California have grappled concerned not only the type of warrant to be issued, but whether or not the government had demonstrated probable cause or its equivalent to justify its issuance. Utilizing the government's own statistics supplied in affidavits and returns in the San Clemente checkpoint warrant in *United States v. Martinez-Fuerte, supra,* note 4, the district court judges were no doubt struck with the fact that 99.9% of the traffic passing through the San Clemente checkpoint does not contain immigration law violators. San Clemente is simply not the place to have a checkpoint, warrant or no warrant.

III.

PROBABLE CAUSE HAVING ALWAYS BEEN REQUIRED FOR SEARCHES OF AUTOMOBILES, A FORTIORI THE EXCLUSIONARY RULE MUST BE APPLIED TO CAUSELESS CHECKPOINT AUTOMOBILE SEARCHES FOR ALIENS CONDUCTED AFTER ALMEIDA-SANCHEZ.

A. The Rule Announced in *Almeida-Sanchez* was not a New Application of the Evidentiary Exclusionary Rule.

1. Supreme Court precedent has continuously maintained a requirement of probable cause for a vehicle search.

Sixty years ago this Court established the exclusionary rule to deny to the Federal Government and its agencies the fruits of unlawful searches in federal criminal proceedings. *Weeks v. United States*, 232 U.S. 383 (1914). Fifty years ago, this Court recognized that exigent circumstances involving moving vehicles might excuse the warrant requirement, but re-affirmed the application of the probable cause requirement to stops and searches of automobiles on a highway. *Carroll v. United States*, 267 U.S. 132 (1925).

Since *Carroll*, there is an unbroken chain of precedent holding that as a minimal constitutional requirement probable cause is required for a stop and

search of an automobile.[38] After *Almeida-Sanchez*, the requirement of probable cause for a vehicle search remains unaltered.

2. The requirement of probable cause as a prerequisite to automobile searches for aliens did not establish a new rule.

In Part II of *Bowen v. United States*, 500 F.2d 960, 975 (9th Cir. 1974), Judge Wallace's approach, although not his conclusion, frames the question before this Court: whether the decision in *Almeida-Sanchez* establishes a new rule for retroactivity analysis. The

[38] *Husty v. United States*, 282 U.S. 694, 695 (1931); *Scher v. United States*, 305 U.S. 251 (1938); *United States v. DiRe*, 332 U.S. 581, 584-587 (1948); *Brinegar v. United States*, 338 U.S. 160, 177 (1949) ("This does not mean, as seems to be assumed, that every traveler along public highways may be stopped and searched at the officers' whim, caprice, or mere suspicion"); *Preston v. United States*, 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) ("The cases so holding have, however, always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime before they begin their warrantless search"); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970) ("After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize"); *Coolidge v. New Hampshire*, 403 U.S. 443, 458-464 (1971); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Automobiles are "effects" within Fourth Amendment).

petitioner (Brief for Pet. 47 n. 25), the Court of Appeals in *Bowen* (500 F.2d 960, 975) and respondent agree that the dissenting opinion of Justice Stewart in *Milton v. Wainwright*, 407 U.S. 371, 381-382 n. 2 (1972), formulates the correct test for determining if a new rule was announced in *Almeida-Sanchez*: "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent [citations omitted]; or disrupts a practice long accepted and widely relied upon [citations omitted]."

Respondent also agrees with the application of the test in *Milton v. Wainwright*. There, the Court[39] recognized that counselless police interrogation of a suspect after indictment, formally condemned in *Massiah v. United States*, 377 U.S. 201 (1964), was not a marked departure in the law but the natural result of the rule announced in *Powell v. Alabama*, 287 U.S. 45 (1932). Respondent submits that the application of the *Carroll* case to checkpoints is analogous to *Milton*. The web of the law requiring probable cause for vehicle searches was formulated in *Carroll* and continued to the present day. In the face of this clear constitutional rule, the Border Patrol attempted to fashion its own exception which this Court struck down in *Almeida-Sanchez*.

Almeida-Sanchez did not overrule clear past precedent of this Court. "No claim is made nor could one be, that the search of the petitioner's car was

[39]The majority held that any error was harmless but did not disagree with the application of the rule by the dissent.

constitutional under any previous decision of the Court involving the search of an automobile." 413 U.S. 269. Justice Powell, concurring found "none of our Fourth Amendment decisions supports the search conducted in this case." *Id.* at 275. The same analysis has led the Fifth,[40] Ninth,[41] and Tenth[42] Circuits to apply the requirement of probable cuase to immigration searches at checkpoints at least since 21 June 1973, the date of the decision in *Almeida-Sanchez*.

As recognized by the above three Circuits, *Almeida-Sanchez* was but a recognition of rules forged in *Carroll*. With *Carroll*, reliance on contrary prior Ninth Circuit opinions is misplaced; the later, inconsistent with the *Carroll* decision, cannot be treated as "clear past precedent." The clear past precedent is *Carroll*.

Almeida-Sanchez did not bring about a disruption of a practice long accepted or widely relied upon by law enforcement officers. Checkpoints existed prior to 1946, but there is no record of where they were or whether searches were conducted of vehicles. If searches

[40]In *United States v. Speed*, 497 F.2d 546 (5th Cir. 1974), a search at a temporary checkpoint *prior* to 21 June 1973 was declared unconstitutional for want of probable cause; *cf.*, *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974) (roving Border Patrol alien search of vehicle prior to *Almeida-Sanchez* upheld based on non-retroactivity analysis).

[41]*United States v. Bowen*, 500 F.2d 960 (9th Cir. *en banc* 1974).

[42] *United States v. King*, 485 F.2d 353 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 362 (10th Cir. 1973). Both cases involved checkpoint searches *before* 21 June 1973. The cases were remanded to the trial court with instructions to dismiss unless the checkpoints were functional equivalents of the border.

of vehicles were in fact conducted, the probable cause rule of *Carroll* may have been followed. All we know of this pre-1946 checkpoint activity is that it was without legal justification until the Attorney General sought and obtained legislation in 1946. During a ten-year period (1963-1973) intermediate federal courts rationalized an exception to probable cause for searches at checkpoints based on the legislation.[43] 8 U.S.C. §1357(a). Reliance was placed upon the statute and regulation, yet the courts of appeal did not squarely resolve the contradictory precedent of *Carroll*, nor could they do so. The Immigration Service has yet to recognize that often pragmatic considerations of alleged law enforcement efficiency must give way to Fourth Amendment considerations (*Cf., United States v. United States District Court*, 407 U.S. 297 (1972)) for the Service continued the operation of the checkpoints without a warrant after they were aware of the decision in *Almeida-Sanchez* (B.Tr. 213) and even after the announcement of *Bowen*.[44] This Court must not permit

[43]*See* Circuit Judge Hufstedler's dissent in *Bowen, supra* at 984 in which an analysis of Ninth Circuit decisional law revealed "that fixed checkpoint searches fared neither better nor worse than searches conducted at temporary checkpoints or by roving patrols away from the border."

[44]*E.g. United States v. Sanchez-Pedraza*, No. 74-2786, now before the Ninth Circuit after a motion to suppress was granted by district court on 19 August 1974. The case involves a causeless stop and detention at the San Clemente checkpoint on 5 June 1974 after *Bowen* and *United States v. Juarez-Rodriguez*, 498 F.2d 7 (9th Cir. 1974), clearly held that such causeless stops and detentions were illegal. The stop in *Sanchez-Pedraza* occurred while the checkpoint was operating without the authorization of a warrant.

the government to establish practices at odds with announced Supreme Court precedent and then allow the continued practice to serve as a basis for claiming exemption from that precedent. Such a bootstrap interpretation would encourage questionable law enforcement practices. This is inconsistent with the Court's practice of establishing rules requiring prudent interpretation by law enforcement officers.

Petitioner notes the requirements of the "new rule" test in *Chevron Oil Co., v. Huson*, 404 U.S. 97, 106 (1971). Brief for Pet. 53. As in *Milton*, the new principle must overrule clear past precedent upon which the parties relied or decide an issue of first impression whose resolution was not clearly foreshadowed. In *Almeida-Sanchez*, this Court did not overrule past precedent, but merely followed the probable cause rule of *Carroll*. For retroactivity analysis purposes, the probable cause rule as applied to alien searches of cars away from the border (or its functional equivalent) begins with *Weeks* and *Carroll*.

Gosa v. Mayden, 413 U.S. 665 (1973), which held the new rule in *O'Callahan v. Parker*, 395 U.S. 258 (1969) (jurisdiction of military tribunals) not to be retroactive is consistent with the above analysis because *O'Callahan* was: (1) a new constitutional rule and (2) "a clear break with the past." 413 U.S. 665, 672-673. More appropriate is the discussion in *Robinson v. Neil*, 409 U.S. 505 (1973), where the Court restated the general common law rule of retrospective effect of its constitutional decisions but limited that rule as it applied to "new constitutional interpretations" involving criminal rights. 409 U.S. 505, 507. The former jeopardy protection against both state and

municipal criminal prosecutions announced in *Waller v. Florida*, 397 U.S. 387 (1970), was given retrospective application. Although this was a new rule of law, in light of *Benton v. Maryland*, 395 U.S. 784 (1969), this Court's "decision in *Waller* cannot be said to have marked a departure from past decisions of this Court." 409 U.S. 505, 510. *Almeida-Sanchez* involved an *old rule* (probable cause to search) following established precedent (*Carroll*). Petitioner's characterization of the probable cause requirements for alien searches as a new rule because of lower court decisions to the contrary is unprecedented and simply wrong. The problems inherent in permitting courts of appeals to fashion constitutional pronouncements binding on the Supreme Court are outlined by Circuit Judge Hufstedler in her dissent in *Bowen*, 500 F.2d 960, 984-985. More important, the need for a universal standard requires the determination of new rules from a single forum binding all other courts. Logic and stability necessitate that this Court "start" and "end" constitutional principles.

Here, precedent was "started" with *Carroll*. *Almeida-Sanchez* recognized and continued the fundamental principles of probable cause to support the stopping and searching of vehicles moving on the highway. If in *Milton v. Wainwright* this Court could find that no new rule was announced by *Massiah*, then by similar reasoning the Court must recognize that the clear language of *Carroll* controls the instant case.

3. Conflicting precedent of lower courts is always subordinated to the decisions of the Supreme Court.

The Ninth Circuit recognized the operation of checkpoints in *Contreras v. United States*, 219 F.2d 63 (9th Cir. 1961) (Temecula checkpoint 72 miles north of the border; case reversed on other grounds); *Fernandez v. United States*, 321 U.S. 283 (9th Cir. 1963) (checkpoint referred to as immigration and customs checkpoint, where officer smelled marijuana emanating from the stopped vehicle); and *Barba-Reyes v. United States*, 387 U.S. 91 (9th Cir. 1967) (San Clemente again referred to as immigration and customs checkpoint; officer detected smell of marijuana after defendant opened trunk of his vehicle). In 1971, Circuit Judge Browning filed his comprehensive dissent which articulated the questionable basis of such searches finding such procedure in conflict with established constitutional principles. *United States v. Almeida-Sanchez*, 452 F.2d 459, 461-468 (9th Cir. 1971). Not only was there a conflict with earlier precedent of the Supreme Court (i.e. *Carroll*), but the judicial exception for alien searches carved from the traditional requirement of probable cause did not comport with Ninth Circuit recognition that probable cause was required for a vehicle search for contraband away from the border. 452 F.2d 459, 463-464. In the earlier decisions, the checkpoints were deemed immigration and customs checkpoints, yet a customs checkpoint was legally impermissible. The Ninth Circuit had created an exception to the generally established rule,[45]

[45]Even this exception had an exception, for the Court of Appeals limited an alien search to places in the automobile where an alien could be hidden. *Valenzuela-Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970).

but this exception initiated by the Court of Appeals did not swallow the constitutional rule or abolish it. The checkpoints existed before statutory or court recognition, but their very existence, having been created after *Carroll*, never had the requisite *imprimatur* that could negate or exempt a checkpoint from the impact of *Carroll*–another Supreme Court decision. Pragmatic considerations of the alleged usefulness of these checkpoints prompted the gamble by the Immigration Service that they would be upheld even in the face of prior precedent such as *Almeida-Sanchez*. When the government seeks an exception from established Supreme Court precedent, it should not be able to take refuge in circuit court opinions inconsistent with rules established by this Court.

4. The checkpoints were neither created in reliance upon statutory precedent nor are they sustained by such legislation.

The Immigration Service acknowledges that traffic checkpoints have been in existence since 1927. Their location, operation, and type of search conducted are unknown, but a cloud on their legality existed from their inception because of the *Carroll* decision and its progeny. Checkpoints were created without statutory or judicial authorization by a blanket claim of authority by the Immigration Service.[46] Only in 1946 was

[46]The assertion of such power is not unusual in our history. "[A] power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the Constitution was designed to guard against. . . ." Cooley, *Constitutional Law* 71 (1st ed. 1868).

legislation passed to give legal justification to this traffic checking procedure. In 1945, the letter of Attorney General Biddle to the Chairman of the House Committee on Immigration and Naturalization set forth the need for expanding the authority of Immigration officers, stating in part:

> "In the enforcement of the immigration laws, it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and *the legal right to do so should be conferred by law.*" H.R.Rep.No.186, 79th Cong. 2d Sess. (1945), 1946 U.S. Code Cong. Service 1414 (Emphasis added).

Although checkpoints had been operating for years, their lack of legal right to exist was recognized by the nation's chief law enforcement officer who sought legislation to operate the checkpoints. The request to search without a warrant within a reasonable distance of an external boundary was enacted with a provision allowing interrogation of persons "believed to be alien[s]." *See* 8 U.S.C. §1357(a)(1) & (3). This general interrogation authority for immigration officers was subordinated to the traditional requirements of reasonable belief that the person interrogated is an alien. *See Au Yi Lau v. Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir. 1970). Under the principles of *ejusdem generis*, it is difficult to sustain an interpretation of an open-ended authority to search vehicles for aliens away from the border without limitation when the same legislation so carefully circumscribes the power of the officer to conduct a simple interrogation.

The Congressional authorization was subject both to the limitation of "reasonable distance" and to the requirement of consistency with the Fourth Amend-

ment and this Court's opinions dating from *Carroll*. The statute, when construed in light of previous precedent and in the context of other subsections, cannot be offered as authority excusing the requirement of probable cause for a vehicle search away from the border or its functional equivalent.

5. The application of the three point test of *Stovall v. Denno*, 388 U.S. 293, 297 (1967) favors the "retroactive" requirement of probable cause for alien vehicle searches.

If this Court were to determine that the requirement of probable cause for warrantless checkpoint searches for aliens is a "new constitutional rule," which respondent submits it is not, then a question of the retroactivity of this new rule would have to be considered. In *Stovall v. Denno*, 388 U.S. 293, 297 (1967), this Court announced the criteria guiding the resolution of the issue of retroactivity: (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

The purpose of the "new rule" is to implement the principles laid down in *Weeks v. United States*, 232 U.S. 383 (1914), and *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, prohibition officers were involved in the stop and search for contraband of an automobile traveling upon the highway, but the distinction between *Carroll's* facts and a stop and search at a checkpoint is insignificant.

The reliance on a practice inconsistent with established precedent or an overly broad interpretation of the Congressional authority granted in 1946 (8 U.S.C. 1357(a)(3)) does not bar "retrospective" application of the probable cause rule.[47] The principal efforts of the Immigration Service to deter and remove illegal aliens will not be adversely affected by the "retroactive" application of the rule; such application is consistent with holding the Immigration Service's law enforcement arm, the Border Patrol officers who also serve as Customs officers, to the same requirements that govern other federal law enforcement officers.

6. The Court of Appeals in *Bowen v. United States* held its decision was not retroactive.

Although the petitioner has claimed the Court of Appeals applied its own "new rule" retroactively, the opinion of the majority (Part II) rejected the application of *Bowen* to cases on appeal and even denied the appellant Bowen relief. 500 F.2d 960, 979, 981. Circuit Judge Wallace, speaking for this majority, stated:

> "We are applying the *Almeida-Sanchez* rule to searches conducted at fixed checkpoints only to deter these unconstitutional procedures in the future. Our reason for applying the rule demonstrates that it should be applied *prospectively only*." 500 F.2d 960, 981. [Emphasis added].

[47] After the decision in *Almeida-Sanchez* and the remand of *Bowen*, the Immigration Service can hardly claim reliance upon the legislation or lower court opinions to justify the continuation of causeless checkpoint vehicle searches for aliens.

Given the petitioner's admission that courts of appeals may establish different cut-off dates for the application of the "new rule" (Brief for Pet. 55), the date established by the Court of Appeals (21 June 1973) should be respected. Not a single circuit judge articulated the strained interpretation for differing cut-off dates suggested by the petitioner. Now that the case has reached this Court, the determination of retroactivity will have to be made not in light of the past decision of the Ninth Circuit, but upon the established precedent of this Court.

B. The federal exclusionary rule should be applied to federal Border Patrol officers conducting alien checkpoint automobile searches prior to 9 May 1974.

The petitioner contends that even if *Carroll* foreshadowed the rule of probable cause for alien checkpoint automobile searches, the policy underlying the federal exclusionary rule precludes its application to such searches conducted before the *Bowen* decision (9 May 1974).

The petitioner's reliance on *Michigan v. Tucker*, 417 U.S. 433 (1974), is misplaced, for it is difficult to claim here that "the official action was pursued in complete good faith" when *Carroll* was on the books since 1925. It is impossible to make such a claim after *Almeida-Sanchez* was decided. *Michigan v. Tucker* concerned an interrogation that took place before *Miranda v. Arizona*, 284 U.S. 436 (1966); thus, it was impossible for the officers who conducted the interrogation to be aware of

"the specific protective guidelines, now known as the *Miranda* rules." 417 U.S. 433, 443. That vehicle searches require probable cause is a rule of long standing and well known in the field of law enforcement; its application to alien searches should not now be treated as a unique exception to the rule formulated in *Weeks v. United States*, 232 U.S. 383 (1914), and followed ever since in federal criminal prosecutions.

The respondent recognizes that the exclusionary rule has been criticized by many who are not familiar with its daily implementation in the trial courts. The rule serves the meritworthy purpose of isolating the judiciary from possible cooperation in police wrongdoing and in inhibiting such police conduct. The petitioner asks this Court for an innovative exception to the exclusionary rule based upon language appearing in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973), and that of Justice Powell in *Cardwell v. Lewis*, 417 U.S. 583, 596 (1974). However, that language proposes to eliminate the use of the Fourth Amendment exclusionary rule where state prisoners in federal habeas corpus proceedings attack their state convictions. Such language is irrelevant to a case involving a federal criminal defendant on direct appeal. The petitioner agrees with the conclusion and result reached by the Ninth Circuit, but not the date announced for the rule. The critical fact is that the Ninth Circuit was not announcing its own new rule, but merely following the one announced by the Supreme Court in *Almeida-Sanchez*. Since the stop and search of the respondent's automobile took place after that decision, the exclusionary rule must be applied.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DATED: 27 December 1974

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HON. EDWARD A. INFANTE)

IN THE MATTER OF AN APPLICATION BY THE UNITED STATES OF AMERICA FOR AN INSPECTION WARRANT FOR THE IMMIGRATION AND NATURALIZATION SERVICE TO OPERATE A FIXED TRAFFIC CHECKPOINT ON INTERSTATE ROUTE 5 FIVE MILES SOUTH OF SAN CLEMENTE, CALIFORNIA	) NO. Misc. 399) WARRANT OF INSPECTION	

TO: Any authorized officer of the Immigration and Naturalization Service including any agent of the U.S. Border Patrol:

Application having been made by the United States for a warrant of inspection for the operation of a fixed checkpoint at San Clemente, California, and having reviewed and considered the affidavits of Robert D. McCord and Richard Wischkaemper, and having reviewed and considered the findings made by the United States District Court in *United States v. Baca*, 368 F.Supp. 398 (S.D.Cal. 1973) and having reviewed and considered a copy of the certified reporter's transcript of the sworn testimony of Deputy Chief Border Patrol Agent Richard E. Batchelor presented in the *Baca* case.

I am satisfied that there is probable cause to believe that mass violations of the Immigration laws of the United States (Title 8, United States Code) have been and are being committed at a point known as the Border Patrol checkpoint on the northbound lanes of Interstate Highway Route 5, approximately five miles south of San Clemente, California.

Wherefore, YOU ARE HEREBY COMMANDED:

(1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;

(2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;

(3) to conduct a routine inspection of said vehicles for the presence of aliens, and;

(4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night, and;

(5) a copy of the warrant shall be displayed in a conspicuous manner at the checkpoint location and upon request, shall be given to any person detained.

(6) The Immigration and Naturalization Service shall file a written return on this warrant containing the following:

A. The approximate number of vehicles passing through the checkpoint during the hours of operation;

B. The approximate number of vehicles stopped for questioning concerning citizenship status;

C. The number of vehicles inspected;

D. The number of vehicles in which aliens were discovered;

E. A recapitulation of the total number of deportable aliens apprehended;

F. An inventory of any property seized.

(7) This warrant shall be returned within ten days of this date, as required by law.

Dated this 22nd day of June, 1974.

/s/ Edward A. Infante
Edward A. Infante
UNITED STATES MAGISTRATE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

AFFIDAVIT

ROBERT D. McCORD, being first duly sworn, deposes and says:

1. I am an Assistant Chief Patrol Agent assigned to the Chula Vista Sector of the United States Border Patrol I have been employed with the Border Patrol continuously since 1957, except for an eight year period when I was assigned as an investigator with the United States Immigration and Naturalization Service. In the course of my duties I have been assigned in various locations in Texas, Florida, and California. In my present capacity I share responsibility with the Chief Patrol Agent in the administration of the sector

and the operations engaged in by 250 officers and 50 auxillary employees.

2. A key function in our basic strategy is the establishment of highway checkpoints at locations beyond 25 miles from the border, utilizing topographical features and extended highways to permit visual examination of the maximum amount of traffic with a minimum incursion and inconvenience upon the public. The location of the checkpoints are correlated along the entire border and provide an effective secondary line of defense.

3. The existence of the checkpoints is a matter of common knowledge in Mexico and Central America to those persons engaged in the soliciting of persons to be smuggled into the interior United States. Officers in the United States Embassy in El Salvador submitted an official intelligence report through the State Department channels precisely locating the checkpoints in San Clemente and Temecula, California, on the basis of information furnished them by covert sources in El Salvador. Those sources further volunteered the information that admission at the Port of Entry was relatively safe, but clearance through the highway checkpoints presented a hazard. The existence of these traffic checkpoints, therefore, are considered a deterrent to those who would attempt to illegally enter this country from south of our border. Additionally, interviews conducted with illegal aliens apprehended from Central America confirm their knowledge of the highway checkpoints.

4. Attached are Exhibits 1 through 17 revealing that 8,440 aliens were apprehended at the San Clemente checkpoint during the first five months of 1973 and

7,718 during the first five months of 1974, and a total of 16,863 for the calendar year 1973.

5. Based upon statistics maintained by the California Division of Highways, 1,200 cars pass through the checkpoint during an average hour.

6. At the traffic checkpoint located south of San Clemente, California, we stop approximately 50 vehicles during each hour of operation for limited inspection consisting of inquiring of the occupants of the vehicle as to their citizenship status.

7. The average car is detained for questioning of the occupants approximately three to five minutes.

8. The purpose of the inspection at the checkpoint is to intercept those aliens who have successfully penetrated the border or who have violated the terms of the legal admission by proceeding beyond the 25 mile limitation without documentation. The resulting action by the U. S. Border Patrol is to arrange a voluntary departure of any illegal aliens located in lieu of deportation, in all but a miniscule number of cases. Less than 3% of all aliens apprehended at the checkpoint are prosecuted under the criminal provisions of the immigration laws.

9. The bulk of the action taken is enforcement regarding violations of the 25 mile limitation on holders of temporary border passes, I-186 cards (see 8 C.F.R. §212.6) and apprehension of those aliens who have entered the United States without inspection in violation of 8 U.S.C. §1325.

10. Illegal entry of aliens within the Chula Vista sector area of responsibility is increasing at an alarming rate, estimated to be approximately 40,000 entries per month.

11. The major purpose of entry is to secure employment, with 95% of all illegal entrants destined for the Los Angeles area or the central portion of California. All illegal aliens apprehended are interviewed. Through sector apprehension reports it has been determined that the vast majority are in travel to interior points such as Los Angeles, and the San Joaquin Valley of California and further, have been in the United States for a short period of time.

12. Some few of the illegal entrants leave the immediate San Diego area by commercial airline, freight train, or passenger train. The vast majority use motorized vehicles and proceed up Interstate Routes 5 or 395, or State Highway 79. Approximately 70% of all illegal alien travellers traverse Interstate Route 5.

13. The checkpoint at San Clemente is located adjacent to the truck scales maintained by the State of California, with the San Onofre State Park and the Pacific Ocean on the West and Camp Pendleton Marine Corps base to the East. It is 68 miles north of the International Boundary and five miles south of the city limits of San Clemente, California. Circumventing the checkpoint is extremely difficult because of the military patrols at Camp Pendleton and the presence of the State Park rangers between the highway and the ocean.

14. The checkpoint at San Clemente is a permanent structure and is intended to remain in operation 24 hours a day, seven days a week. We are unable to maintain the checkpoint in operation continuously because of safety factors that deteriorate because of inclement weather and traffic in excess of 2,500 cars per hour. We are also unable to maintain the checkpoint because of limitations in manpower available

for assignment as well as the basic allocation to that function. The checkpoint is in operation approximately 60% of the time during the year.

15. Smugglers of aliens and those aliens traveling with prior knowledge of the checkpoint customarily wait for the checkpoint to become inactive, for any of the above reasons, before attempting to continue up the highway. This again demonstrates the deterrent effect which the checkpoints have on the traffic in illegal aliens.

16. I have read the opinion of District Court Judge Turrentine in the case of *United States v. Baca*, District Court Number 14656, and to the best of my knowledge the factual findings in regard to the illegal alien problem, the law enforcement problem, and his analysis of the operation of individual traffic checkpoints are correct.

17. A "drop house" is a staging area to keep illegal aliens awaiting inclement weather or, or, any event that might cause the checkpoint to close down temporarily. Experience has shown when the traffic checkpoint is in operation for extended periods of time those "drop

houses" are utilized by smugglers of aliens. We have found a number of such "houses" located in Oceanside, California, south of the San Clemente checkpoint, which have contained up to 86 aliens at a time.

/s/ Robert D. McCord
ROBERT D. McCORD

Subscribed to before me and sworn to in my presence on 6-21-74.

/s/ Edward A. Infante
Edward A. Infante
United States Magistrate